Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-575

SMITH JOHN and HARRY SMITH JOHN,
Appellants,

v.

STATE OF MISSISSIPPI,
Appellee.

On Appeal From the Supreme Court of Mississippi

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-

SMITH JOHN and HARRY SMITH JOHN,
Appellants,

v.

STATE OF MISSISSIPPI,
Appellee.

On Appeal From the Supreme Court of Mississippi

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Mississippi, entered on May 11, 1977, rehearing denied, July 20, 1977, affirming appellants' conviction and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported at 347 So.2d 959 (Miss. 1977) and is reproduced as an appendix to this Jurisdictional Statement.

GROUNDS ON WHICH THE COURT'S JURISDICTION IS INVOLVED

(i) The proceeding below was a criminal prosecution for aggravated assault pursuant to Miss. Code Ann. sec. 97-3-7(2).

(ii) The decision of the court below was dated and entered on May 11, 1977. Appellants made a timely motion for rehearing, which was denied on July 20, 1977. Appellants' notice of appeal to this Court was filed on October 17, 1977, in the Supreme Court of Mississippi.

(iii) Appellants believe this Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1257(2) and/or § 1257(1). This matter is not free from doubt, and in the alternative, appellants pray that the Court treat this Jurisdictional Statement as a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257(3) and 28 U.S.C. § 2103.[1]

(iv) The following cases are believed to sustain the jurisdiction:

[1] Regarding 28 U.S.C. § 1257(2), although the Indian country jurisdiction cases cited under (iv) *infra* were accepted by the Court as appeals, other Indian jurisdiction cases have been reviewed on certiorari, *e.g.*, Williams v. Lee, 358 U.S. 217 (1959). Regarding 28 U.S.C. § 1257(1), the rulings of the court below invalidating Acts of Congress as applied are not entirely clear.

McClanahan v. Arizona Tax Com'n, 411 U.S. 164 (1973)

Warren Trading Post Co. v. Arizona Tax Com'n, 380 U.S. 685 (1965)

Tonasket v. Washington, 411 U.S. 451 (1973)

(v) The validity of Miss. Code Ann. sec. 97-3-7(2) (Supp. 1976) as applied to appellants is involved. The statute is set out in the Appendix to this Jurisdictional Statement.

As an alternate holding, the court below apparently held two Acts of Congress unconstitutional as applied. One is the Indian Reorganization Act of 1934, particularly 25 U.S.C. §§ 467 and 479. The other is the Act of June 21, 1939, Pub.L. 76-147, 53 Stat. 851.[2] These three sections are set out in the Appendix to this Jurisdictional Statement. Based on this ruling, appellants believe that 28 U.S.C. § 2403 may be applicable, and this statement has therefore been served on the Solicitor General pursuant to Rule 33.2(b).

QUESTIONS PRESENTED

Do the Mississippi State Courts Have Jurisdiction to Try and Convict Choctaw Indians of Aggravated Assault Committed within the Choctaw Indian Reservation in Mississippi?

[2] The court below did not refer to this statute, but the statute was argued to it and is obviously relevant. Under the circumstances, the court must necessarily have ruled on the statute implicitly, particularly by its conclusion that a treaty "cannot be altered by an Act of Congress." 347 So.2d at 962. *See* part C of the Argument *infra*.

A. Is the Choctaw Indian Reservation in Mississippi "Indian country," as that term is used in 18 U.S.C. § 1151?

B. Is the re-establishment of Indian country in Mississippi precluded by:

(1) The Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1830)?

(2) Indian citizenship?

(3) The Tribal Status of the Mississippi Choctaws?

(4) Unlawful Application of the Indian Reorganization Act, 25 U.S.C. §§ 461-479?

(5) The Arsenals and Dockyards Clause of the Constitution, art I, § 8, cl. 17?

STATEMENT OF THE CASE

A. Proceedings Below.

Appellants Smith John and Harry Smith John are full-blooded Mississippi Choctaw Indians, residents of the Choctaw Indian Reservation in Mississippi, and enrolled at the federal Indian Agency at Philadelphia, Mississippi. They were indicted by the Leake County, Mississippi, Grand Jury in April 1976 on the charge of aggravated assault in violation of Miss. Code Ann. sec. 97-3-7(2) (Supp. 1976). They filed motions to dismiss and supporting documents to show that the acts giving rise to the state indictment had occurred in Indian country as defined by 18 U.S.C. § 1151 and that appellants had earlier been indicted, tried and convicted in the United States District Court for the Southern District of Mississippi based on the same acts. They contended that the federal court had ex-

clusive jurisdiction over the alleged offense pursuant to 18 U.S.C. §§ 1151-53 and 3242. They also contended that the State prosecution was unlawful double jeopardy. The motions to dismiss were denied, and appellants were tried before a jury on May 7, 1976. Uncontradicted trial evidence showed that appellants are Choctaw Indians and that the acts forming the basis of the criminal charge against them had occurred within the boundaries of the Choctaw Indian Reservation. Appellants were convicted of aggravated assault and sentenced to two years in the Mississippi State Penitentiary.

Appellants prosecuted an appeal to the Supreme Court of Mississippi, which affirmed their conviction and issued the opinion reproduced in the Appendix to this Jurisdictional Statement. The essential basis of that court's opinion is that the Choctaw Indian Reservation in Mississippi is not Indian country, so the federal district court lacked jurisdiction to try and convict appellants.

B. The Related Federal Prosecution.

The earlier federal indictment was returned in October 1975 and charged that appellants are Indians and committed assault with intent to kill in Indian country in violation of 18 U.S.C. §§ 113(a) and 1153.[3]

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[3] In pertinent part, the federal indictment reads:

The Grand Jury charges:

That SMITH JOHN, an Indian, and HARRY SMITH JOHN, an Indian, on or about August 30, 1975, in Leake County, Mississippi, in the NE 1/4 of Section 35, Township 11 N, Range 7 E, in the Jackson Division of the Southern District of Mississippi on and within the Choctaw Indian Reservation and on land within the Indian country under the jurisdiction of the United States of America, did then and there knowingly, willfully, unlawfully and feloniously

Defendants were tried before a federal trial jury on December 7-8, 1975, based on the same acts as charged in the state court the following year. The jury acquitted appellants of assault with intent to kill but convicted them of the lesser included offense defined by 18 U.S.C. § 113(e). The trial action was numbered Criminal Action No. J-75-68(c), United States District Court for the Southern District of Mississippi, Jackson Division.

Appellants appealed their federal conviction to the United States Court of Appeals for the Fifth Circuit, which heard oral argument on October 4, 1976. No decision has been made of that appeal as this is written.[4] The case in that court is numbered 76-1518.

C. Background of the Choctaw Indian Reservation.

The underlying question in this case is whether the federal actions establishing the Choctaw Indian Reservation in Mississippi were sufficient to establish Indian country as defined by 18 U.S.C. § 1151. These actions may be quickly summarized.

In 1830 the Choctaw Tribe entered into the Treaty of Dancing Rabbit Creek with the United States, 7 Stat. 333 (1830). By the Treaty, the Tribe ceded all tribal lands in Mississippi. Choctaws were given the option of removing to Indian Territory or remaining in Mississippi. Article XIV of the Treaty provided to

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assault with intent to kill the person of Artis Jenkins, in violation of Sections 1153 and 113(a), Title 18, United States Code.

[4] Just as this Statement was being sent to the printers, counsel was informed by telephone that the Fifth Circuit decided this appeal on October 11, 1977, and ruled against federal jurisdiction. Counsel has not yet seen the opinion.

each Choctaw family remaining in Mississippi a "reservation" of one section of land. The Mississippi Choctaws were made U.S. citizens but also retained Choctaw citizenship. After five years, all federal restrictions were to be removed from such lands. Many Choctaws remained in Mississippi.

In 1918, after a report on the deplorable condition of the Mississippi Choctaws, Congress authorized land acquisition for them at the urging of Senator Vardaman and other Mississippi congressmen.[5] An Indian agency of the Bureau of Indian Affairs was established at Philadelphia, Mississippi, and land purchases were made from congressional appropriations over the next several years.[6]

In 1934 Congress enacted the Indian Reorganization Act (IRA), intended to revitalize the tribes. 25 U.S.C. §§ 461-479. 25 U.S.C. § 467 authorizes the Secretary of the Interior to "proclaim new Indian reservations." Purchases were resumed for the Mississippi Choctaws, now made under authority of the IRA. H.Rept. No. 194, 76 Cong., 1st Sess. The Interior Department then proposed and Congress enacted the Act of June 21, 1939, Pub.L. 76-147, 53 Stat. 851 (quoted in the Appendix), which declared that all of the land purchased for the Choctaws in Mississippi since 1918 is held in trust by the United States for the Mississippi Choctaws. An express purpose of the Act was to allow the

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[5] Peterson, the Mississippi Band of Choctaw Indians, doctoral dissertation, Miss. St. U. Library, page 109.

[6] 40 Stat. 573 (1918); 41 Stat. 15 (1919); 41 Stat. 420 (1920); 41 Stat. 1236 (1921); 42 Stat. 570 (1922); 42 Stat. 1191 (1923); 43 Stat. 1149 (1925); 44 Stat. 461 (1926); 44 Stat. 941 (1927); 45 Stat. 206 (1928); 45 Stat. 1568-69 (1929); 46 Stat. 286 (1930); 46 Stat. 1121 (1931).

Mississippi Choctaws to organize a tribal government under Sections 16 and 17 of the IRA, 25 U.S.C. §§ 476 and 477. H.Rept. 194, 76th Cong., 1st Sess., page 3. On December 4, 1944, acting pursuant to 25 U.S.C. § 467 and the 1939 Act just described, the Secretary of the Interior issued a proclamation reciting these land acquisitions and providing that "such lands are hereby declared to be an Indian reservation" for the enrolled members of the Mississippi Band of Choctaw Indians of one-half or more Indian blood. 9 Fed. Reg. 14907 (1944). On May 22, 1945, the Secretary recognized the Mississippi Band of Choctaw Indians as a self-governing tribe pursuant to Section 16 of the IRA, 25 U.S.C. § 476.

THE QUESTIONS ARE SUBSTANTIAL

A. Basis of the Decision Below and Related Cases.

As recited above, Congress in 1939 declared that the Choctaw Reservation lands in Mississippi are held in trust for the Choctaws by the United States, and the Secretary of the Interior in 1944 proclaimed the lands to be an Indian Reservation pursuant to his authority under the IRA, 25 U.S.C. § 467, and under the 1939 special Choctaw statute, 53 Stat. 851, *supra.* Appellants contend that either or both of these acts established these lands as Indian country pursuant to 18 U.S.C. § 1151, which includes all federal Indian reservations and all dependent Indian communities. Appellants further contend that federal court criminal jurisdiction over Indian country pursuant to 18 U.S.C. §§ 1151-1153 and 3242 is exclusive of state court jurisdiction.[7]

[7] *See* cases cited under section H, below.

The court below did not rule on the latter point and based its decision essentially on its conclusion that the Choctaw Reservation is not Indian country. The court relied on a number of alternative theories to support this conclusion, some of which are stated in its opinion in this case, and some of which are made by reference to a prior opinion of the same court in *Tubby* v. *State,* 327 So.2d 272 (Miss. 1976).[8] The court also relied on the opinions of the Fifth Circuit Court of Appeals in *United States* v. *Mississippi Tax Com'n,* 505 F.2d 633 (5th Cir. 1974), *rehearing denied,* 535 F.2d 300 (5th Cir. 1976), *rehearing en banc denied,* 541 F.2d 469 (5th Cir. 1976), although Indian country status was not directly at issue in that case.[9] Appellants here contend that each alternative basis for the ruling that the Choctaw Reservation is not Indian country conflicts with prior governing decisions of this Court or with decisions of other federal courts of appeals.

B. The Court Below Ignored the Most Relevant Decisions of This Court.

On at least two prior occasions, this Court has addressed the question whether Indian country may lawfully be established or re-established in a state after statehood. In both cases the Court sustained the power. *United States* v. *McGowan,* 302 U.S. 535 (1938);

[8] The *Tubby* opinion regarding the Choctaws was technically dictum, because the court reversed Mr. Tubby's conviction on other grounds.

[9] The court ruled that the entity being taxed was a state corporation rather than the Tribe or an Indian, and this was the first basis for the Fifth Circuit's decision. 505 F.2d at 638. The court's second ground was that jurisdiction was precluded by 28 U.S.C. § 1341. *Id.* The discussion of tribal status was thus either an alternate holding or, more properly, obiter dictum.

Donnelly v. *United States,* 228 U.S. 243 (1913). These cases were argued to the court below in this case and in *Tubby* v. *State, supra,* but the court failed to address them.[10] The *McGowan* decision indicates that far less federal action than is found here is sufficient to establish Indian country. *See also, United States* v. *Sandoval,* 231 U.S. 28, 48 (1913); F. Cohen, *Handbook of Federal Indian Law* (GPO 1942) pages 7, 359.

More recently the Court in *Antoine* v. *Washington,* 420 U.S. 194 (1975), held that Indian hunting rights dependent on post-statehood federal action are valid despite the lack of state consent. 420 U.S. at 200-05.

C. Re-Establishment of Indian Country Is Not Precluded by the Treaty of Dancing Rabbit Creek.

The court below ruled that the Treaty of Dancing Rabbit Creek (7 Stat. 333) "cannot be altered by an Act of Congress; . . ." 347 So.2d at 962.[11] This is plainly contrary to many decisions of this Court, *e.g., Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903). Furthermore, there is no language in the Treaty that conflicts with the 1944 IRA proclamation or with the 1939 Act of Congress taking lands in trust for the Choctaws.

D. Citizenship of the Indians Is Irrelevant.

The court below lays particular stress on the fact that the Mississippi Choctaws are citizens. However, this Court has repeatedly ruled that citizenship is not inconsistent with federal guardianship and Indian

[10] The cases were also cited and argued to the Fifth Circuit in United States v. Mississippi Tax Com'n, *supra.* That court also ignored these cases.

[11] The Fifth Circuit said this too. 535 F.2d at 302.

country jurisdiction. *McClanahan* v. *Arizona Tax Com'n,* 411 U.S. 164, 172-73 (1973); *Creek County* v. *Seber,* 318 U.S. 705, 718 (1943); *Tiger* v. *Western Investment Co.,* 221 U.S. 286, 310-13 (1911); *United States* v. *Celestine,* 215 U.S. 278 (1909). The precise point of the court below was rejected in *Apapas* v. *United States,* 233 U.S. 587 (1914). This case was cited to the court below but ignored by it.

E. Tribal Status Is Irrelevant.

The court below also ruled that the Mississippi Choctaws are not lawfully an Indian tribe and that this precludes federal authority. This was clear error for two reasons. First, Indian country jurisdiction pursuant to 18 U.S.C. §§ 1151-53 and 3242 does not depend on whether there is a separate tribal entity, as this Court has implicitly recognized in a number of cases, *e.g., United States* v. *Pelican,* 232 U.S. 442 (1914); *United States* v. *Ramsey,* 271 U.S. 467 (1926); *United States* v. *McGowan, supra.* The statutes require only that the accused be an Indian, and the place of the offense charged be Indian country.

Second, this Court has held that when tribal recognition is relevant, it is normally a political question committed to Congress and the Executive Branch and not subject to judicial review. *United States* v. *Holliday,* 70 U.S. (3 Wall.) 407 (1865); *Cf., Baker* v. *Carr,* 369 U.S. 186, 282 (1962). Here the Executive Branch has recognized the Mississippi Choctaws as a tribe entitled to self-government under the IRA Section 16, 25 U.S.C. § 476.

F. The Interpretation of the Indian Reorganization Act by the Court Below Is Erroneous, and There Is a Conflict between Federal Circuit Courts of Appeals.

The court below ruled that the Secretary of the Interior lacked authority to proclaim the Choctaw lands to be an Indian reservation pursuant to Section 7 of the IRA, 25 U.S.C. § 467, because that Act does not apply to the Mississippi Choctaws. Appellants contend that this interpretation is at odds with the plain language of the Act, particularly 25 U.S.C. § 479 defining Indians, and it fails to take into account the special Choctaw statute of 1939, 53 Stat. 851, *supra*.

The Fifth Circuit arrived at the same conclusion. 535 F.2d at 304-06. This position is in direct conflict with the decision of the District of Columbia Circuit in *Maynor* v. *Morton*, 510 F.2d 1254 (D.C. Cir. 1975).

G. The Arsenals and Dockyards Clause Is Inapplicable.

In its earlier decision in *Tubby* v. *State*, *supra*, the court below ruled that federal authority is precluded by the lack of state consent under the Arsenals and Dockyards Clause, U.S. Const. art. I, § 8, cl. 17. 327 So.2d at 281-84. However, this Court has repeatedly ruled that federal authority over Indian affairs does not derive from that clause. *E.g.*, *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 481 n.17 (1976). In *United States* v. *McGowan*, 89 F.2d 201, 202 (9th Cir. 1937), the Ninth Circuit ruled that federal Indian jurisdiction was precluded by the Arsenals and Dockyards Clause, but this Court unanimously reversed, *United States* v. *McGowan*, 302 U.S. 535 (1938). *See also*, *Antoine* v. *Washington*, *supra*, 420 U.S. at 200-05; L.Davis, *Jurisdiction over Indian Country*, I Ariz.L.Rev. 62, 65 (1959).

H. Federal Jurisdiction Is Exclusive.

This Court has repeatedly ruled that absent consent of Congress, the federal criminal jurisdiction in Indian country exercised pursuant to 18 U.S.C. §§ 1151-53 and 3242 is exclusive of state jurisdiction. *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *United States* v. *Kagama*, 118 U.S. 375 (1886); *see*, *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n.2 (1975). There is no applicable consent here. Mississippi has not complied with Public Law 280, 67 Stat. 589 (1953), *as amended*, 25 U.S.C. §§ 1321-1326. *Cf.*, *Kennerly* v. *District Court*, 400 U.S. 423 (1971).

I. The Issues Are Important.

The decisions of the court below in this case and in *Tubby* v. *State*, *supra*, and the Fifth Circuit's alternate holdings and/or dicta in *United States* v. *Mississippi Tax Com'n*, *supra*, have generated great confusion in the administration of Choctaw Indian affairs. The prolonged double prosecution in this case is only one of numerous problems. Choctaw Indians have been prosecuted in the past by the federal government and are incarcerated in federal institutions; numerous federal convictions are drawn into question. The status of an Indian reservation established by Congress and of an Indian band recognized by the United States has been clouded by judicial fiat. Grave uncertainty over federal benefits now provided the Mississippi Choctaws has arisen.

Furthermore these decisions involve legal principles that frequently arise in the administration of Indian affairs nationally, such as the interpretation of Indian Reorganization Act and alleged limitations on federal authority.

CONCLUSION

The decision of the court below is plainly in conflict with numerous decisions of this Court, and it should be reversed.

Respectfully submitted,

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October 1977

APPENDIX

APPENDIX

A. Statutes Involved

Mississippi Code Annotated (Supp. 1976)

§ 97-3-7. Simple assault—aggravated assault.

* * * * *

(2) A person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; and, upon conviction, he shall be punished by imprisonment in the county jail for not more than one (1) year or in the penitentiary for not more than twenty (20) years. Provided, however, a person convicted of aggravated assault upon a law enforcement officer or fireman while such law enforcement officer or fireman is acting within the scope of his duty and office shall be punished by a fine of not more than five thousand dollars ($5,000.00) or by imprisonment for not more than thirty (30) years, or both.

Act of June 21, 1939, Public Law 76-147, 53 Stat. 851

[CHAPTER 235]

AN ACT

To define the status of certain lands purchased for the Choctaw Indians, Mississippi.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title to all lands purchased by the United States for the benefit of the Choctaw Indians of Mississippi, under authority contained in the Act of May 25, 1918 (40 Stat. L., 573), and similar subsequent Acts, not under contract for resale to Choctaw Indians, or on which existing con-

tracts of resale may hereafter be canceled, is hereby declared to be in the United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior.

Approved, June 21, 1939.

25 U.S.C. § 467

§ 467. New Indian reservations

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by sections 461, 462, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title or to add such lands to existing reservations: *Provided,* That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations. June 18, 1934, c. 576, § 7, 48 Stat. 986.

25 U.S.C. § 479

§ 479. Definitions

The term "Indian" as used in sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of said sections, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in said sections shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.

The words "adult Indians" wherever used in said sections shall be construed to refer to Indians who have attained the age of twenty-one years. June 18, 1934, c. 576, § 19, 48 Stat. 988.

B. Opinion Below

Smith JOHN and Harry John

v.

STATE of Mississippi.

No. 49682.

Supreme Court of Mississippi.

May 11, 1977.

Rehearing Denied July 20, 1977.

Edwin R. Smith, Philadelphia, for appellant.

A. F. Summer, Atty. Gen., by Catherine Walker Underwood, Special Asst. Atty. Gen., Jackson, for appellee.

Before PATTERSON, SUGG and WALKER, JJ.

SUGG, *Justice,* for the Court:

The defendants, Smith John and Harry John, were convicted of aggravated assault and sentenced by the Circuit Court of Leake County to serve two years in the penitentiary.[1]

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[1] The judgment of the circuit court was entered May 7, 1976 and each defendant was given credit on the sentence for eight months and eight days time served in jail. The crime for which defendants were convicted occurred on August 30, 1975 and apparently they were detained in jail from the time of their arrest following the commission of the crime until they filed an appearance bond in connection with their appeal to this Court on May 10, 1976.

The primary question is one of jurisdiction between the United States District Court and the Circuit Court of Leake County, Mississippi. Did the United States District Court have jurisdicton to try the defendants under the Major Crimes Act, 18 U.S.C.A. § 1153, or did the Leake County Circuit Court have jurisdiction to try the defendants under Mississippi Code Annotated section 97-3-7(2) (Supp.1976). Both courts could not have jurisdiction because the prosecution in each was based on the same acts of the defendants.

The errors assigned are: (1) The trial court erred in failing to sustain defendants' motion to dismiss after their prosecution in United States District Court resulted in a conviction of simple assault based on the same incident which resulted in their conviction in the Circuit Court of Leake County. (2) The trial court erred in denying defendants' plea of former jeopardy because they had been convicted in United States District Court for the same act. (3) The trial court erred in subjecting defendants to trial following their trial in United States District Court because their trial in the state court constituted invidious racial discrimination.

Defendants were convicted of simple assault in the United States District Court for the Southern District of Mississippi for violating 18 U.S.C.A. § 113 and were sentenced to serve ninety days and to pay a fine of $300.

Federal custody over the defendants was obtained through a habeas corpus ad prosequendum. Defendants' brief states that the defendants' misdemeanor conviction in the United States District Court has been appealed to the Fifth Circuit Court of Appeals. They contend that unless and until the United States District Court's conviction is overturned the state has no right to proceed with its prosecution on the indictments in the state court.

The United States District Court's judgment of conviction was entered December 15, 1975 before our decision in *Tubby* v. *State*, 327 So.2d 272 (Miss.1976) and before the decision of the Fifth Circuit Court of Appeals in *United States of America et al.* v. *State Tax Commission of State of Mississippi et al.*, 535 F.2d 300 (5th Cir. 1976).[2]

Tubby, supra, involved the conviction of a Choctaw Indian for arson for burning a house owned by another Choctaw Indian located on land purchased for the Choctaw Indians with trust funds held by the United States. We held in *Tubby* that Mississippi has criminal jurisdiction over all crimes committed by Choctaw Indians within this state because: (1) "Indian County" within Mississippi was extinguished by land patents issued to the individual Choctaw Indians under the terms of the Treaty of Dancing Rabbit Creek. (2) All Choctaw Indians residing within Mississippi have been made citizens of the state by terms of the Treaty of Dancing Rabbit Creek, by amendment to the Mississippi Constitution, and by Mississippi statutes. (3) The Choctaw Indians of Mississippi do not fall within the provisions of the Federal Indian Reorganization Act granting certain rights of home rule to Indians because they gave up their status as reservation Indians and became citizens of Mississippi before the enactment of the Indian Reorganization Act, §§ 1 et seq., 25 U.S.C.A. §§ 461 et seq. (4) Choctaw Indians became subject to Mississippi law when the United States Government issued patents to their land. (5) The courts of Mississippi have jurisdiction of Choctaw Indian citizens in the same manner and to the same extent that they have jurisdiction over other citizens of Mississippi.

Although the decision of the Fifth Circuit Court of Appeals in *United States* v. *State Tax Commission*, 535 F.2d

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[2] See decision of three judge panel in *United States of America et al.* v. *State Tax Commission of State of Mississippi et al.*, 505 F.2d 633 (5th Cir. 1974).

300 (5th Cir. 1976) involved a tax question, the holding is persuasive on the issues involved in this case. The Fifth Circuit held:

> After the ratification of the Treaty of Dancing Rabbit Creek the Choctaw Indians who chose to remain in Mississippi were no longer an Indian Tribe, they were citizens of Mississippi, and they most assuredly were not wards of the United States. The only way they could reassume Choctaw tribal citizenship was to move to the Indian Territory.
>
> As cited in the original opinion, a thorough discussion of this situation was authored by Mr. Justice Pitney in *Winton* v. *Amos*, 255 U.S. 373, 41 S.Ct. 342, 344, 65 L.Ed. 684 (1921). That opinion of the Supreme Court sets forth in interesting detail the many *unsuccessful* efforts of the Mississippi Choctaws to reassume Choctaw citizenship without moving to the Indian Territory. See, also, *Choctaw Nation* v. *United States*, 119 U.S. 1, 7 S.Ct. 75, 30 L.Ed. 306 (1886).
>
> • • • • •
>
> In any event, this Treaty was made by and between the Tribe and the United States and both were bound by its terms. By remaining and accepting (or claiming later, as some did) the lands allotted to those who wished to stay, the individual Indian likewise bound himself to the provisions of the Treaty.
>
> The Treaty of Dancing Rabbit is a part of the Supreme Law, United States Constitution, Article 6, Clause 2, and it cannot be altered by an Act of Congress, Congress cannot obliterate the jurisdiction of Mississippi over its citizens.
>
> This case simply does not fit into the extensive jurisprudential grooves developed with reference to Indian wards or those Indian Reservations which

> were established either by Treaty or created by Congress for those who never converted their Indian status to that of state citizenship.
>
> • • • • •
>
> The Choctaw Indians of Mississippi do not live in Indian country. Except for that land patented to individual Indians under the terms of the Treaty (and not in trust) the Tribe sold all of its land to the United States in 1830. By 1850 virtually every acre of it had been patented to private purchasers by virtue of sales at the Land Offices in Columbus and Paulding. See *DeCoteau* v. *District County Court for Tenth Judicial District*, 1975, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed2d 300. See also, *Dillon* v. *Antler Land Company of Wyola*, 9 Cir. 1974, 507 F.2d 940, *cert. denied*. 421 U.S. 992, 95 S.Ct. 1998, 44 L.Ed.2d 482.
>
> • • • • •
>
> We adhere to the view originally entertained that the definition of the term "Indian" appearing in Section 19 in no way altered or amended the description of those entitled to organize under the terms of Section 16.
>
> We also adhere to the opinion that:
>
> (1) The Choctaw Indians residing in Mississippi in 1934 were not members of an Indian tribe. The tribe was in Oklahoma. The tribal status of the Mississippi Choctaws had been permanently extinguished by the 1830 Treaty of Dancing Rabbit Creek;
>
> (2) Granting that Section 7 of the 1934 Act authorized the Secretary of the Interior to set up new Indian reservations, we think that the clear intent of Congress was to legislate for Indian tribes, not for individual Indians;
>
> (3) We see nothing in the Acts of Congress conferring authority upon the Secretary of the Interior

to create Indian tribes where none had theretofore existed. Under Section 16 only a tribe could organize for self-government, etc. Additionally, we think the purpose was to give the tribes some independence from the Bureau of Indian Affairs;

(4) Nothing in the various Congressional enactments indicates a desire or purpose to abrogate the Dancing Rabbit Treaty;

(5) Nothing in the various Congressional enactments indicates a desire or purpose to oust Mississippi of its jurisdiction over those who had been its citizens, so declared by Treaty, for over a hundred years.

Consequently, we are of the opinion that the jurisdiction of the State of Mississippi over its citizens of Choctaw Indian blood stands unimpaired. (535 F.2d at 302, 306).

In view of *Tubby* and *United States* v. *State Tax Commission, supra,* we are of the opinion that the United States District Court had no jurisdiction to proceed with the prosecution of the defendants under 18 U.S.C.A. §1153 (Supp.1976).

In their second assignment of error defendants argue that they have been subjected to double jeopardy because they were convicted in the United States District Court under 18 U.S.C.A. §1153 and under Mississippi Code Annotated section 97-3-7(2) (Supp.1976) for the same act. The argument is without merit because former jeopardy does not exist unless the previous trial was before a court of competent jurisdiction. It has long been settled in this state that a party who has been tried and convicted by a court not having jurisdiction of the offense cannot plead former jeopardy if subsequently indicted for the same offense in a court having jurisdiction thereof. *Montross* v.

State, 61 Miss. 429 (1883). We do not find any case in which the United States Supreme Court has addressed this question and none was cited in the briefs. However, the federal courts in the various circuits adhere to the rule expressed in *Montross, supra.* See cases annotated in West Federal Practice Digest, *Criminal Law,* Key 167. In 22 C.J.S. *Criminal Law* §244 at 643-644 (1961) the general rule is stated as follows:

> Former jeopardy does not exist unless the previous trial was before a court of competent jurisdiction, and a judgment void for lack of jurisdiction is not a bar to a subsequent prosecution for the same offense. The court in which the prior acquittal or conviction was obtained must have been one having jurisdiction of the offense charged and also of accused, obtained by due process based on legal proceedings. However, the judgment of a court having jurisdiction is a bar to a subsequent prosecution for the same offense, even though the judgment is erroneous and voidable, or the court erred in exercising a discretion vested in it. The fact that a court having jurisdiction when the trial starts thereafter loses it by rendering judgment thereon on Sunday does not change the fact that accused had been placed in jeopardy. Where accused procured a prior conviction to be set aside on the ground that the court was without jurisdiction, he is estopped subsequently to assert, in support of a defense of previous jeopardy, that such court had jurisdiction.

The trial of defendants in the Leake County Circuit Court following a trial in the United States District Court did not amount to double jeopardy because the United States District Court did not have jurisdiction of the crime with which defendants were charged.

Defendants' third assignmnt of error is that their trial in state court constituted invidious racial discrimination and in their brief state the following:

> Artis Jenkins, the victim of the allegedly unlawful assault which gave rise to both the state and the federal prosecutions, was a non-Indian. Both Smith John and his son, Harry Smith John, are full-blooded Choctaw Indians. The incident took place upon lands which are Indian country under federal law. As Indians accused of one of the crimes enumerated under the Major Crimes Act, Defendants were subjected to trial in federal court. 25 U.S.C. 1153; 18 U.S.C. 3242 Had the Defendants instead been non-Indians, they would have been subject only to state court jurisdiction. Clearly, then, if jurisdiction were found to be vested over defendants Smith and Harry Smith John so as to permit the state and the federal courts to proceed against them, they could be tried a second time for their assault against Artis Jenkins only because of their race. Subjection of the defendants to a second, state trial, therefore, is violative of the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States, in that it is invidious discrimination based upon race. So fundamental and self-evident is the proposition that it requires no further supporting authorities.

The fallacy of defendants' argument is that the United States District Court had no jurisdiction to try them under Major Crimes Act, 18 U.S.C.A. § 1153. There is no Indian country in Mississippi, the defendants are citizens of Mississippi subject to its laws, and therefore are subject to prosecution in its courts. Defendants stated in their brief that their conviction in the United States District Court has been appealed to the Fifth Circuit Court of Appeals. If the Fifth Circuit should hold that the United States District Court had jurisdiction under 18 U.S.C.A. § 1153 and affirm their conviction a conflict in decisions between the Fifth Circuit and this Court would result. This conflict could then be properly resolved in the United States Supreme Court.

The defendants are in the same position as any other defendant, regardless of race or color, who has been tried for a crime by a court which had no jurisdiction. We therefore reject this argument of defendants that they are victims of invidious racial discrimination because of their prosecution in the state court.

AFFIRMED.

GILLESPIE, C.J., PATTERSON and INZER, P. JJ., and SMITH, ROBERTSON and BROOM, J.J., *concur.*

WALKER, J., *specially concurs.*

LEE, J., *took no part.*

WALKER, *Justice, specially concurring.*

In view of this Court's holding in *Tubby* v. *State*, 327 So.2d 272 (Miss.1976), I concur. However, I am still of the opinion that *Tubby* was erroneously decided.

Supreme Court, U. S.
FILED
DEC 10 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-575

SMITH JOHN AND HARRY SMITH JOHN,

Appellants,

v.

STATE OF MISSISSIPPI,

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS AS *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

As shown in the discussion of the interest of the *amicus curiae* within, this case is of vital interest to the Mississippi Band of Choctaw Indians (the Tribe). While the Tribe is not a party, its jurisdiction is at

stake in this litigation. The appellants have consented to the filing of the Tribe's brief *amicus curiae,* but the appellee, the State of Mississippi, has refused its consent. The *amicus* brief is timely, as the brief of the State has not yet been filed and, consequently, no delay will be caused by acceptance of this brief.

The Mississippi Band of Choctaw Indians therefore respectfully moves for leave to file the attached brief *amicus curiae* in this case.

INTEREST OF THE *AMICUS CURIAE*

As we show within, the Mississippi Band of Choctaw Indians is a federally recognized Indian Tribe of more than 3,700 members with a Reservation established by Acts of Congress and declaration of the Secretary of the Interior under authority of Section 7 of the Indian Reorganization Act of 1934, (Act of June 18, 1934, 48 Stat. 984,) 25 U.S.C. 467.

The decision of the Supreme Court of Mississippi holds that the Secretary of the Interior's recognition of the Mississippi Band of Choctaw Indians as an Indian Tribe for purposes of the Indian Reorganization Act and the Secretary's declaration of the Reservation under the Act are invalid (J.S. App 4a, 8a). The Mississippi Supreme Court also holds that the State of Mississippi has exclusive criminal jurisdiction within the land held in trust by the United States for the Mississippi band of Choctaw Indians; that such trust land is not "Indian Country" within the meaning of 18 U.S.C. 1153. (Pet. App. 4a-8a).

The decision below is clearly incorrect and should be summarily reversed.

The Tribe's interests in the welfare of its people, in preserving its trust relationship with the United States,

and in continuing tribal government are at stake in this appeal.

STATEMENT

The Choctaw Indian Tribe was indigenous to the area now occupied by the State of Mississippi, though its original territory exceeded the State's boundaries.[1] After having its territory narrowed through a series of treaties[2] the Tribe in 1830 was forced to cede all tribal land in Mississippi.[3] The bulk of the Tribe was to move to Oklahoma, tribal members were, however, permitted to remain in Mississippi and were promised a reservation of one section of land each (*ibid*, Article 14).

Extensive land frauds and the inability of many of the Choctaw to speak English, or to understand non-Indian land tenure, resulted in most of the Choctaws who remained in Mississippi either never receiving or losing the land promised them by treaty. As Representative Venable of Mississippi stated (Hearings before subcommittee of House Committee on Appropriations, Indian Appropriation bill, 1922, 66th Cong. 3d Sess (1920), p. 329):

> . . . . When I came to Congress . . . I was already interested . . . in the condition of the full blood Choctaw Indians of Mississippi, about 1200 of whom live in my district . . . . Their economic condition was very bad. They had no schools,

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[1] See Treaty at Hopewell, January 3, 1786, 7 Stat. 21.

[2] E.g., 1801 – Treaty at Fort Adams (7 Stat. 66); 1802 – Treaty at Fort Confederation (7 Stat. 73); 1803 – Treaty at Hoe-Buckin-too-pa (7 Stat. 80); 1805 – Treaty at Mount Dexter (7 Stat. 98);

[3] Treaty at Dancing Rabbit Creek, 7 Stat. 333.

they lived back in the interior along the little creeks and rivers.

* * * * *

They reserved certain land to themselves when the Choctaw Tribe moved to Oklahoma. But they were relieved of all restrictions. They were a people who had never had any experience in the handling of individualistic property . . . The result . . . was what anyone could have expected, that knowing nothing of the value of the land, and having had no experience in the handling of land, in the course of time they practically lost their lands and parted with them for a song . . . .

* * * *

The result is that the Indians, without any fault on their own part and we will say without any fault on the part of the Government—as such—we will say they were unfortunate in their agents—never received any substantial relief at all.

* * * *

I did not feel that it was an answer to say that these Indians at one time had certain lands, because the way the Government let them handle these lands produced the result that was inevitable.

Until the early 1900's the United States largely ignored the Mississippi Choctaws or was concerned only with moving them to Oklahoma. The Mississippi Choctaws, in this period, lived as outcasts in Mississippi, part of neither white nor black society, but retained their language, traditions, and cohesion. They lived primarily in seven small aboriginal Indian villages in the area of Philadelphia, Mississippi.[4]

[4]The villages, which remain the centers of the Reservation today, are Bogue Chitto, Bogue Homa, Conehatta, Pearl River, Red Water, Standing Pine, and Tucker. The best history of the [footnote continued]

The Bureau of Indian Affairs sent special agents to visit the Mississippi Choctaws in 1908 and again in 1916. "The reports of these agents emphasized the poor health, education, and economic status of the Choctaws." (Peterson, *op. cit.* 110) The need to bring the Mississippi Choctaws under federal trsut responsibility was obvious and came to a head at the time of World War I and the influenza epidemic of 1918. The Choctaws, living in substandard housing as share croppers, without land, " . . . . were dying like flies, often without any medical attention." (*Ibid*, quoting from the wife and nurse of a local doctor). With pressure from the Mississippi Congressional delegation (see Peterson, 1093; statement of Representative Venable, supra p. 3-4) an Agency of the Bureau of Indian Affairs was established at Philadelphia, Mississippi in 1918 to serve the Mississippi Choctaws (Act of May 25, 1918, 40 Stat 573; Peterson, 111-118).

Under a series of specific appropriations beginning with the establishment of the agency, the United States purchased land in and near the traditional Indian communities for the Mississippi Choctaws which became the basis of the Tribe's present reservation.[5]

Mississippi Choctaws between 1830 and roughly 1970 is John Holbrook Peterson, Jr., *The Mississippi Band of Choctaw Indians: The Recent History and Current Social Relations*, a doctoral dissertation submitted to the University of Georgia (Athens, Georgia, 1970) and published in facsimile by University Microfilms, A Xerox Company, Ann Arbor, Michigan (1970), hereafter referred to as "Peterson."

[5]Act of May 25, 1918, 40 Stat. 573; Act of June 30, 1919, 41 Stat. 15; Act of February 14, 1920, 41 Stat. 420; Act of March 3, 1921, 41 Stat. 1236; Act of May 24, 1922, 42 Stat. 570; Act of January 24, 1923, 42 Stat. 1191; Act of March 3, 1925, 43 Stat. 1149; Act of May 10, 1926, 44 Stat. 461; Act of January 12, 1927, 44 Stat. 941; Act of March 7, 1928, 45 Stat. 206; Act of March 4, 1929, 45 Stat. 1568-69; Act of May 14, 1930, 46 Stat. 286; Act of February 14, 1931, 46 Stat. 1121.

In the 1920's and early 1930's considerable, though modest, progress was made. In addition to purchases of land, the United States opened a series of Indian elementary schools providing the first formal education available to most Mississippi Choctaw Indians:

Pearl River School–1920
Standing Pine School–1920
Tucker School–1921
Bogue Homa School–1922
Red Water School–1925
Conehatta School–1928
Bogue Chitto School--1930
(Peterson, p. 129)

A bureau of Indian Affairs hospital was opened in 1929 and expanded in 1934. (Information supplied by The Choctaw Agency, Bureau of Indian Affairs).

The true return to dignity and self-determination for the Mississippi Choctaw Indians began shortly thereafter.

In 1934 Congress enacted the Indian Reorganization Act, (IRA) supra, 25 U.S.C. 461-479. Section 5, 25 U.S.C. 465, authorized the Secretary of the Interior to acquire lands ". . . within or without existing reservations . . . for the purpose of providing lands for Indians." Section 7, 25 U.S.C. 467, authorized the Secretary of the Interior to "proclaim new Indian reservations on lands acquired persuant to . . . . this Act." Section 19, 25 U.S.C. 479, defined Indians so as to include not only recognized bands as well as tribes but "all other persons of one-half or more Indian blood."

Under these provisions the United States made additional purchases for the Mississippi Choctaws. H. Rpt. No. 194, 76th Cong., 1st Sess. (1939) p. 1. The Interior Department then proposed and Congress enacted the Act

of June 21, 1939, 53 Stat. 851, (J.S. App. 1a-2a), which declared that "all lands purchased by the United States for the benefit of the Choctaw Indians of Mississippi . . . is hereby declared to be in the United States for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior." The specific purposes of the 1939 Act were to place the lands already purchased for the Choctaw Indians in Mississippi "in the same status as the lands being purchased under the Indian Reorganization Act" and to allow the Mississippi Choctaws to organize a tribal government under section 16 of the IRA, 25 U.S.C. 476 H. Rept. No. 194, *supra*, pp. 2-3.

On December 4, 1944, acting pursuant to the 1939 Choctaw Act and Section 7 of the Indian Reorganization Act, 25 U.S.C. 467, the Secretary of the Interior issued a proclamation listing the lands held in trust by the United States for the Mississippi Choctaws and stating that "such lands are hereby declared to be an Indian reservation for the benefit of those members of the Mississippi Band of Choctaw Indians of one-half or more Indian blood." App. A, *infra*, 9 Fed. Reg. 14907 (1944). On April 20, 1945, the Secretary ratified the Constitution and Bylaws of the Mississippi Band of Choctaw Indians, limiting membership to Mississippi Choctaw Indians of one-half or more Indian blood (Art. III).

The Mississippi Choctaw Indian population living on or near the reservation based on a 1974 survey is 3,783 Indians.[6] Unlike many Indian tribes, the majority of the Choctaw are full-blood Indians, and Indians of

[6]Choctaw Demographic Survey, pp. 2, 4. The Survey, made under grant from the Office of Education, United States Department of Health, Education and Welfare, was published in March, 1975 by the Mississippi Band of Choctaw Indians. We have lodged a copy with the Clerk and served copies on the parties.

less than half-blood are, as shown above, not eligible for membership. The 1974 survey shows (*id* p. 16, table 20) that 80.3 % of the Choctaws predominantly speak the Choctaw language in their homes; an additional 12.3% speak both Choctaw and English. Only 7.1% reported that they speak predominantly English at home (*ibid*).

The Mississippi Band of Choctaw Indians has made steady progress in a difficult environment under federal trust responsibility, and has developed a strong government and system of social services.

To the elementary school system, a BIA Choctaw Central High School has been added; all the schools offer bi-lingual Choctaw-English programs.

Vast strides have been made in housing, largely Indian built through a tribal construction company and federal funding. The Indian Health Service has recently completed a new hospital on the Reservation and a tribal community health program strives to make medical service available to all the people.

The total federal expenditure on behalf of the Tribe in fiscal year 1976 was $10,762,400, covering a full range of social services.[7]

An important part of this tribal progress is the federal and tribal court system. The Mississippi Choctaw Reservation is located in a portion of Mississippi where white racial intolerance and police insensitivity are well documented recent historical facts, and too often present today. It is important to the progress of the Tribe, a group of culturally, racially and linguistically distinct

[7]The expenditures are detailed in App. B, *infra*, letter of November 25, 1977, from the Choctaw Agency of the Bureau of Indian Affairs to counsel.

people, that they have federal law enforcement to assure that crimes against them are punished, and thus discouraged. But federal and tribal law enforcement also serve another vital purpose. Indians accused of offenses in their communities are apprehended by Indian police and are tried either in the Tribal Court (misdemeanors) or in federal courts, thus minimizing the effect of local prejudice in apprehension, jailing, and trial.[8]

The tribal police force consists of eight BIA policemen drawn from the Tribe but paid and directed by the BIA and two tribal trainees, paid by the Tribe. A tribal jail was built in 1974 with Federal Law Enforcement Assistance (LEAA) funds. Prior to that time the government contracted for use of jails as far away as Meridian, Mississippi, to avoid placing Indians in the Neshoba County Jail at Philadelphia, Mississippi, which was and is considered unsafe.

Indian juvenile offenders are usually handled through the tribal youth center or tribal foster homes if they appear before the Tribal Court, rather than being incarcerated in the county jails.[9]

If the decision of the Supreme Court of Mississippi is not reversed, the federal and tribal court system will be without jurisdiction, the Indians will be fully subject to state and county law enforcement. Successful tribal programs dependent on federal support and the existence of the tribe itself will be jeopardized.

[8]The "Tribal Court" is technically a Bureau of Indian Affairs "court of Indian Offenses" See 25 C.F.R. 11.1 *et seq.* Its three principal judges are tribal members. A local lawyer, usually non-Indian, serves as auxilliary judge.

[9]Information concerning the tribal court system and jails was furnished counsel by Robert Benn, Superintendent of the Choctaw Agency, Bureau of Indian Affairs, Philadelphia, Mississippi, by letter dated November 22, 1977 and in telephone conversations.

THE FEDERAL QUESTION IS SUBSTANTIAL

I.

THE MISSISSIPPI SUPREME COURT HAS RULED ON A POLITICAL QUESTION BEYOND ITS JURISDICTION, NAMELY THE RECOGNITION OF AN INDIAN TRIBE.

The Supreme Court of Mississippi to find exclusive state criminal jurisdiction has apparently held that the Mississippi Choctaws ceased to be an Indian tribe after the 1830 Treaty at Dancing Rabbit Creek and that the Secretary of the Interior could not thereafter treat them as a tribe under the Indian Reorganization Act (Pet. App. 5a-8a). But these determinations, necessary to the Mississippi court's conclusion, intrude into a function entrusted to the political branches of the federal government—Congress and the Executive. For at least 100 years, this Court has without exception deferred to decisions by the Secretary of Interior and Congress as to whether an entity is an Indian tribe. In *United States v. Holliday*, 70 U.S. 407, 419 (1866), the Court held that:

> "In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same."

See also *The Kansas Indians*, 72 U.S. 737, 755-756 (1867) (federal recognition of continued existence of tribe prevented State taxation of tribal land).

An unbroken line of cases—*United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188, 195(1876);*United States v. Sandoval*, 231 U.S. 28 (1913); and *United States v. Candelaria*, 271 U.S. 432 (1926)—confirms that the courts will not review recognition of an Indian tribe by the executive or legislative branches unless that decision

is "arbitrary" or a "manifestly unauthorized exercise of power." *United States v. Sandoval*, supra at 46; *Baker v. Carr*, 369 U.S. 186, 216 (1962).

The court below disregarded these controlling decisions by failing to give any weight whatsoever—let alone the substantial weight that should have been accorded—to the clear determinations by Congress and the Secretary that the Mississippi Choctaws are an Indian tribe entitled to the benefits of the Indian Reorganization Act.

To some extent, this error of the court below may have been due to another misconception it had—that since Congress had removed the Choctaw Tribe to Oklahoma by the 1830 Treaty, it could not subsequently alter the treaty by recognizing the Mississippi remnant. The court quoted with approval a recent decision of the court of appeals for the Fifth Circuit *United States v. State Tax Commission* 535 F.2d 300 (1976) as follows:

> "The Treaty of Dancing Rabbit [sic] is a part of the Supreme Law, United States Constitution, Article 6, Clause 2, and it cannot be altered by an Act of Congress" [J.S. App 6a]

This is plain error. This Court has long confirmed the plenary power of Congress to alter the provisions of a a treaty. E.g., *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587-588 (1977); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 555-566 (1902).

II.

THE MISSISSIPPI SUPREME COURT HAS CONSTRUED THE INDIAN REORGANIZATION ACT AND THE SPECIAL CHOCTAW LEGISLATION IN A MANNER THAT DEFEATS THEIR REMEDIAL PURPOSES.

Section 5 of the IRA (25 U.S.C. 465) authorizes the Secretary of the Interior to acquire lands "*within or without existing reservations* . . . for the purpose of providing lands for *Indians*" (emphasis added). Section 7

(25 U.S.C. 467) authorizes the Secretary "to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act . . ." Section 19 (25 U.S.C. 479) defines Indians in a way which clearly includes the Choctaw Indians of Mississippi: "the term 'Indian' as used in this Act [in addition to members of recognized tribes or *bands*] . . . shall further include all other persons of one-half or more Indian blood".

Within his authority, then, the Secretary continued after 1934 to take land in trust for the Mississippi Choctaws, and proclaimed the lands a reservation for the Mississippi Choctaws pursuant to Section 7, supra.[10]

The Secretary's actions were also, as we have shown authorized by the Act of June 21, 1939, *supra*, which specifically declared that land purchased for the Choctaw Indians of Mississippi is held in trust by the United States for such persons "of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior." The purposes of that Act, as we have shown, were to treat all the land purchased for the Choctaw of Mississippi as land purchased under the I.R.A. and to "facilitate matters greatly if the Indians should choose to organize under Section 16 of the Indian Reorganization Act and take over administration of their lands," H. Rept. No. 194, 76th Cong. 1st sess., p. 3.

The above statutes are as clear as any statutes could be

[10]Since Section 19 of the IRA also defines a "tribe" as "any organized band . . . or the Indians residing on one reservation," after be proclaimed the reservation the Secretary permitted the Mississippi Choctaws which had been an organized band for some time and now had a reservation to adopt a constitution and by-laws pursuant to Section 16 of the IRA, 25 U.S.C. 476.

in evincing the intent of Congress that lands may be taken in trust and a reservation established for the Mississippi Choctaws. The actions of the Secretary of the Interior in establishing the Reservation are likewise plainly in harmony with the authority conferred upon him by Congress.

The Mississippi Supreme Court concluded, however, that despite these contemporary interpretations by Congress itself and the Secretary, Congress did not intend to include the Mississippi Choctaws within the Indian Reorganization Act, an Act of general application in the governments' wardship over Indians.[11]

This error of the Mississippi Court appears to us to be based on a misconception of the extent of Congress' power and trust responsibility concerning Indians.

Congress' guardianship over Indians is not limited to the protection of tribes as such but reaches the protection of individual Indians and bands or communities of Indians fragmented from tribes. Article I, Section 8, Clause 3 of the Constitution expressly gives Congress power over commerce with the Indian tribes. But Congress' power flows not only from that clause. As war and government policy broke up tribal structures, a broader constitutional base for Congress' power over Indian affairs was recognized by this Court. In *Board of Commissioners v. Seber,* 318 U.S. 705 (1943), this Court, in upholding the immunity from state taxation of land

[11]Compare *Maryland Casualty Company v. Citizens National Bank of West Hollywood,* 361 F.2d 517, 477 (1966, C.A. 5) upholding the immunity from suit of the Seminole Tribe of Florida, Inc., the I.R.A. reorganization of the Seminole band in Florida. The majority of the Seminoles had been removed to Oklahoma, as had been the case with the Choctaw and Cherokee.

purchased for individual Indians, under two Acts of Congress held [at 715]:

> The Acts of 1936 and 1937 are constitutional. From almost the beginning the existence of federal power to regulate and protect the Indians and their property against interference even by a state has been recognized.
>
> * * * *
>
> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, *and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic* [emphasis supplied].

Seber is particularly relevant here because it upholds the constitutionality of Congress' provision of land, and tax immunity, to "un-enrolled Creeks of the half blood or more ***" although the tribal rolls of that Tribe, also removed to Oklahoma, had been closed (318 US at 718-719).

Plainly, Congress had authority to provide a reservation, trust lands and other federal protections to the destitute Mississippi Choctaws. It would be a cruel and senseless result if Congress, having removed the bulk of a tribe to a reservation, was without power to establish federal protection for the remnant left behind—the group often in most need of help. To be sure, Congress cannot "bring a community or a body of people within the range

of this power by arbitrarily calling them an Indian tribe," *United States v. Sandoval*, 231 U.S. 28, 46 (1913). But Congress and the Secretary have made no arbitrary classifications here. The beneficiaries of these statutes are at least half-blood (and most are full-blood) Choctaw Indians—whom Congress found abandoned, long-neglected and in clear need.

III.

THE HOLDING BELOW THAT THE STATE OF MISSISSIPPI HAS CRIMINAL JURISDICTION OVER LAND HELD IN TRUST BY THE UNITED STATES FOR THE MISSISSIPPI BAND OF CHOCTAW INDIANS IS DIRECTLY CONTRARY TO THIS COURT'S DECISION IN *UNITED STATES v. McGOWAN*, 302 U.S. 535 (1938)

The Supreme Court of Mississippi held that land held in trust by the United States for the Mississippi Band of Choctaw Indians is not "Indian country" under 18 U.S.C. 1153 (as defined in 18 U.S.C. 1151) and is not subject to federal criminal jurisdiction (J.S. App. 8a). Totally apart from questions of reservation status this holding, on which the case turns, is clearly in error.

When the Indians of Nevada were removed to reservations, scattered Indians were left about the State. In 1917 and in 1926, Congress appropriated funds out of which land was bought in trust for these Indians. The Acts closely resembled the Choctaw Act of May 25, 1918, and like that early act did not refer to the Indians, specifically as a tribe. In considering whether this created "Indian country" and federal criminal jurisdiction although Nevada had already become a State, the Supreme Court in *United States v. McGowan*, stated, 302 U.S. at 538-539 (1938):

> The fundamental consideration of both Congress and the Department of the Interior in establishing

this colony has been the protection of a dependent people. Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as "reservations." Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out, and it is immaterial whether Congress designates a settlement as a "reservation" or "colony." In the case of United States v. Pelican, 232 U.S. 442, 449, this Court said:

> "In the present case the original reservation was Indian country simply because *it had been validly set apart for the use of the Indians as such, under the superintendence of the Government.*"

The Reno Colony has been validly set apart for the use of the Indians. It is under the superintendence of the Government. The Government retains title to the lands which it permits the Indians to occupy. The Government has authority to enact regulations and protective laws respecting this territory. "Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States." *United States v. Ramsey,* 271 U.S. 467, 471. [footnotes omitted, emphasis in original.]

While it is clear that the Mississippi Choctaw Reservation is validly established, the existence of federal and tribal criminal jurisdiction, and the absence of state jurisdiction, turns on the definition of Indian country in 18 U.S.C. 1151 not "reservation status." As *McGowan* demonstrates, the acquisition of land in trust for the Indians and the extension of federal services to them creates Indian country. Moreover, under 18 U.S.C. 1151, a definition enacted after *McGowan,* adopting its

principle, federal jurisdiction extends not only to all land within an Indian Reservation but to "(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state . . . ." The land held in trust for the Mississippi Band of Choctaw Indians is clearly within this definition.

The criminal jurisdiction of the United States as set forth in 18 U.S.C. 1151 and 18 U.S.C. 1153 precludes state jurisdiction over offenses committed by or against Indians in Indian country, and precludes jurisdiction by the State of Mississippi over the appellants here. *Seymour v. Superintendant of Washington State Penitentiary,* 368 U.S. 351 (1962); see also *United States v. Antelope* No. 75-661 decided April 19, 1977.

CONCLUSION

This Court should grant the appeal or, in the alternative, the petition for a writ of certiorari and should reverse the decision of the Mississippi Supreme Court.

Respectfully submitted,

HARRY R. SACHSE
SONOSKY, CHAMBERS
& SACHSE

Attorneys for *amicus curiae.*

APPENDIX A
9 F.R. 14907

PROCLAMATION

WHEREAS, prior to June 18, 1934, and pursuant to authority of and with funds made available by the act of May 25, 1918 (40 Stat. 573), and several subsequent similar acts, approximately 3,550 acres of lands in Mississippi were purchased for the use and benefit of Choctaw Indians of that State;

AND WHEREAS, the act of June 21, 1939 (53 Stat. 851) provides:

> "That title to all lands purchased by the United States for the benefit of the Choctaw Indians of Mississippi, under authority contained in the Act of May 25, 1918 (40 Stat. L., 573), and similar subsequent Acts, not under contract for resale to Choctaw Indians, or on which existing contracts of resale may hereafter be canceled, is hereby declared to be in the United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior."

AND WHEREAS, on March 30, 1935, the Choctaw Indians resident in Mississippi, of one-half or more Indian blood, pursuant to Section 19 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) voted to accept the provisions of that act, and subsequently pursuant to Section 5 of said act, approximately 11,600 acres of additional land in Mississippi have been acquired for the use and benefit of the Choctaw Indians of one-half or more Indian blood, resident in that State, the title having been taken in the name of the United States in trust for said Choctaw Indians;

AND WHEREAS, none of the previously acquired lands for the benefit of the aforesaid Choctaw Indians is now covered by any outstanding contract or contracts for the resale of any part thereof to any Choctaw or other Indian;

NOW THEREFORE, by virtue of the authority contained in the act of June 21, 1939, and in Section 7 of the Act of June 18, 1934, *supra*, I hereby declare that the lands in Mississippi acquired by the United States prior to June 18, 1934, for the benefit of the Choctaw Indians of that state are now held in trust by the United States for the benefit of those Choctaw Indians of one-half or more Indian blood resident in that state on January 1, 1940, as shown by the census rolls of the Choctaw Indian Agency, Mississippi, and such other Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as the recognized tribal authorities of the Mississippi Band of Choctaw Indians, with the approval of the Secretary of the Interior, find to be entitled to membership therein; and I hereby further declare that the approximately 11,600 acres of additional land in Mississippi, acquired since June 18, 1934, for the benefit of the Choctaw Indians of that State are hereby added to the land previously acquired and such lands are hereby declared to be an Indian reservation for the benefit of those members of the Mississippi Band of Choctaw Indians, of one-half or more Indian blood, resident in Mississippi and enrolled at the Choctaw Indian Agency as aforesaid.

For convenient identification a legal description of the areas of land acquired for the benefit of the Choctaw Indians and covered hereby, is hereto appended as "Ex-

hibit A" which is made a part hereof to the same extent as though set forth in full herein.

Done at the City of Washington, District of Columbia, this *4th* day of *December*, 1944.

APPENDIX B

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
CHOCTAW AGENCY
PHILADELPHIA, MISSISSIPPI 39350

IN REPLY REFER TO:

Administration

November 25, 1977

Honorable Harry Sachse
Attorney at Law
2030 M Street, NW
Washington, D. C. 20036

Dear Mr. Sachse:

Listed on the attachment are the federal expenditures in assisting the Choctaw Tribe for Fiscal Years 76 and 77 (from all federal sources of funding) for your information.

Sincerely yours,

William W. Tyke
Acting Superintendent

Attachment

RECEIVED NOV 28 1977

FEDERALLY FUNDED TRIBAL PROGRAMS

Source	Fiscal Year 1976	Fiscal Year 1977
Bureau of Indian Affairs Contracts	$1,575,988.00	$2,425,940.00
Department of Labor	$1,042,081.00	735,253.00
Indian Health Service Contracts	435,842.00	$1,147,351.00
National Institute of Alcholism and alchol abuse	59,290.00	59,290.00
Housing and Urban Development	26,000.00	26,000.00
Office of Community Development	303,984.00	
Appalachion Regional Commission	40,672.00	
Department of Health, Education and Welfare	$1,267,530.00	$1,342,549.00
Law Enforcement Agency Administration	14,000.00	116,244.00
Office of Economic Opportunity	51,500.00	
TOTAL	$4,816,887.00	
Revenue Sharing		48,000.00
Economic Development Administration		736,920.00
National Endowment for Arts		12,500.00
Civil Service Commission		25,025.00
U. S. Department of Agriculture		257,000.00
Community Services Administration		100,000.00
American Becentennial Commission		140,000.00
TOTAL		$7,172,072.00
* B.I.A Choctaw Agency Budget	$3,322,200.00	$3,995,200.00
* I.H.S Choctaw Health Center Budget	$2,623,313,00	$3,743,180.00

* Does not include Tribal Contracts

Supreme Court, U. S.
FILED
DEC 27 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 77-575

SMITH JOHN AND HARRY SMITH JOHN,
Appellants,

vs.

STATE OF MISSISSIPPI,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

[redacted] OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

A. F. SUMMER, Attorney General
By: CATHERINE WALKER UNDERWOOD
Special Assistant Attorney General
P. O. Box 220
Jackson, Mississippi 39205
Attorney for Appellee

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

In the Supreme Court of the United States

No. 77-575

SMITH JOHN AND HARRY SMITH JOHN,
Appellants,

vs.

STATE OF MISSISSIPPI,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

MOTION IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The appellee objects to the filing of the Brief *Amicus Curiae* and has refused consent to its filing. Such Motion For Leave To File Brief *Amicus Curiae* has not been timely presented to this Court as required by Rule 42 (3), Rules of the Supreme Court of the United States. The Jurisdictional Statement, the position of which the *amicus* supports, was docketed with this Court October 18, 1977. Appellee's Motion To Dismiss was filed December 14, 1977. Appellee received the Motion For Leave To File Brief *Amicus Curiae* on December 13, 1977. Appellee's motions must be mailed outside the State for printing which necessitates early completion of the preparation of the motions to allow sufficient time for its printing. Appellee, in this case, has not been allowed sufficient time to respond.

The questions of law and the facts at bar have been exhaustively covered by the Appellants and the Appellee whose brief. have been before this Court for well over a week.

The bulk of the Motion For Leave To File Brief *Amicus Curiae* And Brief Of The Mississippi Band Of Choctaw Indians As *Amicus Curiae* contains matters outside the record, and is not supported by any authority, and has nothing to do with the issues at bar.

Such Brief adds nothing to this case and Appellee has refused consent and objects to the filing of the Brief *Amicus Curiae.*

Respectfully submitted,

A. F. SUMMER, Attorney General

By: CATHERINE WALKER UNDERWOOD
Special Assistant Attorney General
P. O. Box 220
Jackson, Mississippi 39205
Attorney for Appellee

CERTIFICATE

I, Catherine Walker Underwood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Motion In Opposition To Motion For Leave To File Brief *Amicus Curiae* to Harry R. Sachse, Sonosky, Chambers, & Sachse, 2030 M Street, N.W., Washington, D.C. 20036; Richard B. Collins, Esquire, Native American Rights Fund, 1506 Broadway, Boulder, Colorado 80302; Edwin R. Smith, Esquire, Box 467, Philadelphia, Mississippi 39350; and The Solicitor General, Department of Justice, Washington, D.C. 20530.

This, the 23rd day of December, A.D., 1977.

CATHERINE WALKER UNDERWOOD
Special Assistant Attorney General

Supreme Court, U. S.
FILED
MAR 17 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-575

SMITH JOHN AND HARRY SMITH JOHN, APPELLANTS

v.

STATE OF MISSISSIPPI

No. 77-836

UNITED STATES OF AMERICA, PETITIONER

v.

SMITH JOHN AND HARRY SMITH JOHN

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The appeal in No. 77-575 was docketed October 18, 1977
The petition for certiorari in No. 77-836 was filed December 10, 1977

Certiorari was granted in No. 77-836 and jurisdiction over the appeal was postponed in No. 77-575 on January 16, 1978

INDEX

No. 77-575

SMITH JOHN AND HARRY SMITH JOHN

v.

MISSISSIPPI

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No. 77-836

UNITED STATES OF AMERICA

v.

SMITH JOHN AND HARRY SMITH JOHN

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Docket entries, *State of Mississippi* v. *Smith John and Harry Smith John*, Leake County Circuit Court, No. 76–99, April Term 1976:

	Date
Indictment	April 28, 1976.
Motion to dismiss on grounds of lack of jurisdiction	April 29, 1976.[1]
Motion to dismiss on grounds of double jeopardy	April 29, 1976.[1]
Motion for change of venue	April 29, 1976.
Motion for change of venue argued and denied	May 6, 1976.
Motions to dismiss for lack of jurisdiction and double jeopardy argued and denied	May 6, 1976.
Trial	May 7, 1976.
Verdict	May 7, 1976.

[1] Joint motion.

Docket Entries

Case No. 49,682, *Smith John & Harry John* v. *State*, Supreme Court of Mississippi:

	Date
Notice of Appeal to Reporter	August 13, 1976.
Abstract of Record—Edwin R. Smith	October 20, 1976.
Brief of Appellant	October 20, 1976.
Brief for Appellee—Catherine Walker	November 16, 1976.
Reply Brief of Appellant—Edwin R. Smith	November 29, 1976.
Argued and Sub	April 27, 1977.
Opinions	May 11, 1977.
Petition for Rehearing Edwin R. Smith	May 26, 1977.
Petition for Rehearing Denied	July 20, 1977.
Mandate Issued	July 21, 1977.

	Date
Motion for Bail or Release Pending Filing for Petition for Writ of Cert. Edwin R. Smith.....	.....
Response to Motion for Bail Catherine Walker Underwood.....	July 22, 1977.
Motion for Bail or Release Pending Filing of a Petition for Writ of Certiorari Sustained upon the Filing and Approval of Bail Bond in the sum of $1,000 each..	July 27, 1977.
Appearance Bond for Smith John filed	July 29, 1977.
Appearance Bond for Harry John filed	July 29, 1977.

In the Supreme Court of Mississippi

No. 49,682

Wednesday, July 20, 1977, Court Sitting

SMITH JOHN AND HARRY JOHN

v.

STATE OF MISSISSIPPI

This cause this day came on to be heard on Petition for Rehearing filed herein and this Court having sufficiently examined and considered the same En Banc and being of the opinion that the same should be denied doth order that said Petition be and the same is hereby denied. Gillespie, C. J., and Lee, J., took no part.

Supreme Court of the United States

No. 77-575

SMITH JOHN AND HARRY SMITH JOHN, APPELLANTS

v.

MISSISSIPPI

ORDER

APPEAL from the Supreme Court of Mississippi.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of case on the merits. The case is consolidated with No. 77-836 and a total of one hour is allotted for oral argument.

January 16, 1978.

ATTORNEYS

Robert E. Hauberg
U. S. Attorney

Ed Smith
P. O. Box 467
Philadelphia, Ms. 39350

II. KEY INTERVALS & DATES

ARREST | INDICTMENT X | ARRAIGNMENT | TRIAL

Information 10-7-75 | 10 24 75 | Trial Set For | Vow Dire | Disposition

Waived | 1st Plea 10 24 75 | X Not Guilty | Trial Began 12 08 75 | X Convicted

Final Plea 10 24 75 | Trial Ended 12 09 75

III. MAGISTRATE

		DATE	INITIAL/No.	INITIAL APPEARANCE	INITIAL/No.	OUTCOME
Search Warrant	Issued					
	Return			PRELIMINARY EXAMINATION OR REMOVAL HEARING	Date Scheduled	
Summons	Issued				Date Held	
	Served			Waived		Held for District GJ
Arrest Warrant				Not Waived	Intervening Indictment	Held to Answer to U. S. Dist.
COMPLAINT				Tape No.	INITIAL/No.	
OFFENSE (As Complaint)						Magistrate's Initials

* Show last names and suffix numbers of other defendants on same indictment/information

JOHN 1

IV. MAGISTRATE & DISTRICT COURT DOCKET ENTRIES

DATE	PROCEEDINGS
10-7-75	Indictment, filed.
10-7-75	Praecipe for Warrant, filed.
10-8-75	Warrant for Arrest, original and one copy, copy having attached certified copy of Indictment, issued and handed U. S. Marshal.
10-24-75	Plea of NOT GUILTY entered.
10-29-75	Copy of CJA 20 form appointing Edwin R. Smith attorney for deft., fld.
11-5-75	Magistrate's Record of Proceedings and complaint, filed.
11-14-75	Marshal's returns on subpoenas to testify, executed as to Larry Cooper, Billy Joe Brown, A. B. Chamblee, W. Marsett Townsend and Artis Jenkins, filed.
12/02/75	Marshal's return on subpoena to testify executed as to Dr. W. Douglas Godfrey on 12/01/75, filed.
12/09/75	Marshal's return on subpoena to testify executed as to Mrs. Artis Jenkins on 12/06/75, filed.
12/09/75	EXHIBITS: Govt. 1 and Govt. 2, filed.
12/09/75	JURY VERDICT: "We, the Jury, find the Defendant (Harry Smith John) to be Guilty of Simple Assault," filed.

OPPOSITE THE APPLICABLE DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC §3161(h) – "SPEEDY TRIAL ACT".

75-68(C)

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE (a)	(b)
12/09/75	Order for Marshal to provide meals for jurors, filed and entered OB 1975, Pg. 2424.		
12-15-75	(SMITH JOHN) Motion of deft. for Judgment of Acquittal, with cert. of service, filed.		
12/12/75	Marshal's return on subpoenas to testify executed as to Choice Collier, Boyd Willis, Russell Willis and Maggie Allen, filed.		
12-15-75	JUDGMENT & COMMITMENT: Deft. convicted of offense of simple assault, which is a lesser offense than that charged in the indictment. Sent.: Impr. 90 days and pa, fine in sum of $300.00; deft. be conf. until pmt. of fine, entered CJB #10, page 71.		
12-15-75	J.S. 3 Card.		
12-16-75	Judgment & Commitment Distribution: Original & 1 copy to CLERK, 3 copies to USM, 1 copies to CSIPO, remaining copies to U.S.ATTORNEY.		
12-18-75	Motion of defts. to arrest judgment, with cert. of service, filed.		
12-18-75	Notice of above motion for hearing on 12-19-75, with cert. of service, filed.		
01/13/76	Marshal's return on judgment & commitment executed by delivering deft. to Madison County Jail at Canton, Miss. on 01/09/76, filed		
2-10-76	ORDER: Motion of defts. in Arrest of Judgment is without merit and relief sought denied, filed and entered OB 1976, page 367 (copy mailed U. S. Attorney and atty. for defts., Ed Smith)		
2-18-76	Deft's /Notice of Appeal to Fifth Circuit from order denying deft's Motion to Arrest Judgment entered on 2-6-76, filed. (copy mailed U. S. Attorney)		
2-27-76	Defts' Description of Parts of Transcript to be included in Record and Statement of Issues, with cert. of service, filed.		
3-11-76	CERTIFICATE AND ORDER: defts. having served their sentence of 90 days and in addition been detained an add'l 30 days pending payment of a fine, this Court has conducted a hearing in accordance with Section 3569, Title 18, U.S.C. and finds and certifies that said defts are indigents and should be discharged this date, filed and entered OB 1976, page 508 (copy mailed attorneys) (two copies handed U. S. Marshal)		
4-1-76	AGREED STATEMENT OF FACTS ON APPEAL approved by Judge Harold Cox, filed. (Original forwarded Fifth Circuit)		
11-3-77	Certified copy of Opinion of Fifth Circuit: Reversed and remanded, filed.		
11-3-77	Certified copy of Judgment of Fifth Circuit: Reversed and remanded in accordance with opinion of this Court, issued as Mandate 11-2-77, filed and entered OB 1977, page 2449 (copy handed C. Bond for Judge Cox)		
11-3-77	J.S. 2 - Reopened.		
1-24-78	Pursuant to telephone request, record on appeal returned to Fifth Circuit for certification to U.S. Supreme Court on writ of certiorari.		

Prelim. & Mag. Judge / Trial Judge: 538 / 3 / 3802 / 3802 — U. S. vs. JOHN, Smith — 07 10 75 — 75-68-1

CHARGES — U. S. Code Section: 18: 1153 & 113(a) — Offenses: Crime on an Indian Reservation — Counts: 1

U. S. Attorney or Asst.: Robert E. Hauberg, U. S. Attorney

Defendant: Ed Smith, P. O. Box 467, Philadelphia, Ms. 39350

ARREST — INDICTMENT — ARRAIGNMENT — TRIAL — SENTENCE

Indictment: Information ☐ — 10-7-75 — Waived ☐ — Superseding Indict/Info ☐

Arraignment: 10 24 75 — 1st Plea 10 24 75 — Final Plea

Trial: Trial Set For — Not Guilty — Note — Not Guilty — Note — Guilty — Trial Began 12 08 75 — Trial Ended 12 09 75

Sentence: 12 15 — Disposition — Convicted — Acquitted — Dismissed

Search Warrant: Issued / Return — Summons: Issued / Served — Arrest Warrant — COMPLAINT — OFFENSE (as Complained)

INITIAL APPEARANCE — PRELIMINARY EXAMINATION OR REMOVAL HEARING: Date Scheduled / Date Held — Waived — Not Waived — Intervening Indictment — Tape No. — INITIAL/No.

OUTCOME: Dismissed — Held for District GJ — Held to Answer to U.S. District Court — BOND — AT:

Magistrate's Initials

• Show last names and suffix numbers of other defendants on same indictment/information: JOHN 2

DATE	PROCEEDINGS
10-7-75	Indictment, filed.
10-7-75	Praecipe for Warrant, filed.
10-8-75	Warrant for Arrest, original and one copy, copy having attached certified copy of Indictment, issued and handed U. S. Marshal.
10-24-75	Plea of NOT GUILTY entered.
10-29-75	Copy of CJA 20 form appointing Edwin N. Smith attorney for deft., fld.
11-5-75	Magistrate's Record of Proceedings and Complaint, filed
11-14-75	Marshal's returns on subpoenas to testify executed as to Larry Cooper, Billy Joe Brown, A. B. Chamblee, W. Marsett Townsend and Artis Jenkins, filed.
11-28-75	Marshal's returns on subpoenas to testify, executed as to Dr. L. M. Fulcher, Jr. and Stanton A. Jenkins, filed.
12/02/75	Marshal's returns on subpoenas to testify executed as to Dr. W. Douglas Godfrey on 12/01/75, filed.
12/09/75	Marshal's return on subpoena to testify executed as to Mrs. Artis Jenkins on 12/06/75, filed.
12/09/75	EXHIBITS. Govt. 1 and Govt. 2 filed.
12/09/75	Order for Marshal to provide meals for jurors, filed and entered OB 1975, Pg. 2424.

OPPOSITE THE APPLICABLE DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELA (a)	(b)	(c)
12/09/75	JURY VERDICT: "We, the Jury, find the Defendant (Smith John) to be Guilty of Simple Assault," filed.			
12-15-75	Motion of deft. SMITH JOHN for Judgment of Acquittal, with cert. of service, filed.			
12/12/75	Marshal's return on subpoenas to testify executed as to Choice Collier, Boyd Willis, Russell Willis and Maggie Allen, filed.			
12-15-75	JUDGMENT & COMMITMENT: Deft. convicted of offense of simple assault, which is a lesser offense than that charged in the indictment. Sent.: Impr. 90 days and pay fine in sum of $300.00; deft. be conf. until pmt. of fine, entered CJB #10, page 70.			
12-16-75	Judgment & Commitment Distribution: Original & 1 copy to CLERK. 3 copies to USM, 1 copies to CUSPO, remaining copies to U.S.ATTORNEY.			
12-15-75	J.S. 3 Card.			
12-16-75	ORDER: motion of Smith John for judgment of acquittal is overruled and is denied, filed and entered OB 1975, page 2488 (copy handed U. S. Attorney, mailed Edwin R. Smith)			
12-18-75	Motion of defts. to arrest judgment, with cert. of service, filed.			
12-18-75	Notice of above motion for hearing on 12-19-75, with cert. of service, filed.			
01/13/76	Marshal's return on judgment & commitment executed by delivering deft. to Madison County Jail at Canton, Miss. on 01/09/76, filed			
2-10-76	ORDER: Motion of defts. in Arrest of Judgment is without merit and relief sought denied, filed and entered OB 1976, page 367 (copy mailed U. S. Attorney and atty. for defts., Ed Smith)			
2-18-76	Deft's Notice of Appeal to Fifth Circuit from order denying deft's Motion to Arrest Judgment entered on 2-6-76, filed. (copy mailed U. S. Attorney)			
2-27-76	Defts' Description of Parts of Transcript to be included in Record and Statement of Issues, with cert. of service, filed.			
3-11-76	CERTIFICATE AND ORDER: defts. having served their sentence of 90 days and in addition been detained an add'l 30 days pending payment of a fine, this Court has conducted a hearing in accordance with Section 3569, Title 18, U.S.C. and finds and certifies that said defts are indigents and should be discharged this date, filed and entered OB 1976, page 588 (copy mailed attorneys) (two copies handed U. S. Marshal)			
4-1-76	AGREED STATEMENT OF FACTS ON APPEAL approved by Judge Harold Cox, filed. (Original forwarded Fifth Circuit)			
11-3-77	Certified copy of Opinion of Fifth Circuit: Reversed and remanded, filed.			
11-3-77	Certified copy of Judgment of Fifth Circuit: Reversed and remanded in accordance with opinion of this Court, issued as Mandate 11-2-77, filed and entered OB 1977, page 2449 (copy handed C. Bond for Judge Cox)			

(a) Interval (see Section II) (b) Appl Date / End Date (c) Ltr Code

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U.S. vs JOHN, SMITH

J75-00068-01(C)
Yr. | Docket No. | D

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DEL/ (a)	(b)	(c)
11-3-77	J.S. 2 - Reopened.			
1-24-78	Pursuant to telephone request, record on appeal returned to Fifth Circuit for certification to U.S. Supreme Court on writ of certiorari.			

AO 257

Interval | Start Date | Lt

2/7/75

SUBJECT	CROSS APPEAL NO.	CASE NUMBER
X		76-1518

CIRCUIT S APPEAL ___ FROM Southern DISTRICT OF Mississippi AT Jackson

DATE DOCKETED 2/26/76 $50 FEE PAID ---------- JUDGE William Harold Cox

DATE NOTICE OF APPEAL FILED 2/18/76

D.C. DOCKET NUMBER J-75-68(C)-CR

3

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SMITH JOHN and HARRY SMITH JOHN,

Defendants-Appellants.

IN FORMA PAUPERIS

APPEARANCE FILED-DATE	CODE	ATTORNEYS FOR APPELLANT	ARG
2/26/76 ORDER		Edwin B.Smith, P.O. Box 4567, Philadelphia, Mississippi 39350 (Court-Apptd.) (601-656-7867)	

CLOSED

APPEARANCE FILED-DATE	CODE	ATTORNEYS FOR APPELLEE	ARG
3/5/76	X	Robert E. Hauberg, U.S. Atty., P.O. box 2091, Jackson, Mississippi	
3/5/76		Daniel E. Lynn, AUSA -do- (490-4480)	
8-30-76		Larry G. Gutterridge, Dept. of Justice, 9th & Penna Ave., N.W., Washington, D.C. 20530	
8-30-76	X	Peter R. Taft, Asst.Atty. Gen., - do -	
8-30-76	X	Edmund B. Clark, Atty., - do -	

TITLE: U.S.A. -vs- SMITH JOHN and HARRY SMITH JOHN NO. 76-1518

RECORD, EXHIBITS AND BRIEF INFORMATION

Filing	
	Partial Record or Ord. List
3-24-76	Record on Appeal — No. of Vols 1
4-9-76	Supp. Record — No. of Vols 1
	Second Supp. Record — No. of Vols
3-29-76	Exhibits
5-14-76	Appendix
	Former Appeal Record
	Administrative Transcript
	Briefing Notice Issd.
7-14-76	Brief for Appellant
	Brief for Appellant
	Brief for Cr. Appellee
8-26-76	Brief for Appellee (7) 4 copies
	Brief for Appellee
	Brief for Cr. Appellee
9-9-76	Reply Brief for Appellant
9-13-76	Supp. Brief for Appellant
9-22-76	Supp. Brief for Appellee
	Brief for Amicus
	Intervenor
	Rule 11(e) Certificate
10-6-76	ORDER ENV. AP EXHIBITS
10-6-76	ORD REC OF EXHIBITS
10-14-76	

MISCELLANEOUS FILINGS

Filing	
2/26/76	Dup. Notice of Appeal and Clerk's Statement of Docket Entries
	Papers Trans. from Misc. No.
	Order of DC Ext. Time to File Record to
	Order of DC Granting Appeal IFP
2/26/76	Order of DC Appointing Counsel
	Affidavit of Financial Status
2/26/76	CJA 20 Voucher Rec'd 11-17-77 (Supp)
	Notice of Election Rule 23(c)
	Appellant's Designation
	Appellee's Designation
	Designation
	Order to Show Cause
	Lower Rule 59(e) Dismissal Order
	CJA 21 for Transcript

AGENCY REVIEW CAPTION

Filing	
	Petition for Review of Order/ Enf. of ☐ NLRB ☐ FMC ☐
	Application for Enforcement – NLRB
	Answer to Application for Enforcement
	Cross Application for Enforcement

4. EXTENSION Flg. Motion for:

Order Filed	Ext. to:
	Record Trans.
	Appendix
	Appellant's Brief
	Appellant's Brief
	Appellant's Brief
	Appellee's Brief
	Appellee's Brief
	Appellee's Brief
	Reply Brief

5. CALENDAR INFORMATION

Rule 18 Notice Issued

12-3-76 Case Assigned for 10-4-76 ☐ SS ☐ W ☐ E Jackson

Case Cons'd for Reassignment

Case Reassigned for ☐ SS ☐ W ☐ E ☐

Hearing Panel JPC - JCG - JCW

10-7-76 Case Argued SS Appellant SS Appellee

Case Sub. w/o Arg. ☐ by Appellant ☐ by Appellee

6. OPINION INFORMATION

10-11-77 Opinion Rendered

Affirmed

Rev. in Pt.

Vacated P.C. Concl. Spec.

Dismissed Signed Rh.

Rule 21 Dis. in Pt.

Opinion Withdrawn

7. REHEARING INFORMATION

Mot. for Ext. – Ext. to

Mot. for Ext. – Ext. to

Petition for Rehearing

☐ Appellant ☐ Appellee ☐ Reg. ☐ En Banc

Petition for Rehearing

☐ Appellant ☐ Appellee ☐ Reg. ☐ En Banc

Response of

Order Denying Rehearing

Dissenting

☐ Opinion

☐ Order on Petition for Rehearing

76-1518

8. MOTIONS

Filing Motion to or for	Response Filed By	Date	Granted	Denied	By Court Clerk	Date
Mandamus						
Docket Appeal Out of Time						
Reinstate Appeal						
Stay Further Proceedings in CA						
Stay Pending Appeal						
Injunction Pending Appeal						
Consolidate Appeals						
Leave to Appeal IFP						
Bail Pending Appeal						
Withdraw as Counsel						
Appointment of Counsel						
Leave to File Supp. Record						
Hearing on Original Record						
Hearing on Orig. Rec. & Typed Brief						
Leave to File Typed Brief						
Leave to File Brief in Excess Pgs.						
Dismiss by Appellant						
Dismiss by Appellee						
Amicus Curiae						
Leave to File Supp. Brief						
Stay of Mandate						
Recall of Mandate						

9. OTHER DOCKET ENTRIES

9/29/76	Flg. appellee's letter dtd. 9/28/76 responding to Ct.'s recent request that record be supplemented, with copy of Proclamation of Secretary of Interior attached. C.E.
2-2-77	Flg. Response of Appellee's to Court's Request concerning the Solitor General filing a Petition for Cert. in Case No. 73-3014. (C.E.)
4/8/77	Flg. letter of Appellee dated 4/5/77. (CE)
7/5/77	Flg. letter of appellee dtd. 6/23/77 calling Court's attention to similar cases, with attached opinions. (CE)

CODE TO ENTRIES

ARG – Argued
CE – Clerk's Exhibit(s)
E – Exit Courtroom
ES – En Banc Courtroom
F – Filed
H – Handwritten
J – Sent to Judge
L – Large
M – Memo or Offset
P – Printed
PT – Preliminary Type
S – Small
SS – See Section 9
Sub – Submitted
T – Typed
W – Week (s) Wages

10. JUDGMENT OR MANDATE INFORMATION

	Bill of Costs
	Flg. & Ent'g. Judgment
NOV 2 1977	Mtng. Copies of Jdgt. to Bill & Cnsl.
	Jdgt. or Mdt. Rec'd. to Clerk
	Jdgt. or Mdt. Recalled to Clerk
	Dismissal Mdt. to Clerk
NOV 2 1977	Record on Appeal Rec'd to Ct. (supp) (Volume Rec'd to Ct. 1 and 1 Suppl.) Record on Appeal left to Clerk
2-2-78	Exhibit left to Clerk in envelope
	Mandate Stayed to

11. SUPREME COURT INFORMATION No. 77-836

2-2-78	Preparing Proceedings for Printing: Flg. Appellee's Letter
	Preparing Subst. Proceedings on Cert.
	Transmitting Orig. Exhibits to S.C.
11-3-77	Order of S.C. – Ent. re: 12-14-77
12-16-77	Notice of Flg. of Cert. Pet. on: 12-19-77
1-20-78	Order of S.C. ☐ Denied ☒ Granted 1-16-78
	Notice of Stance of Pet. for Rehearing.
	Opinion of S.C. dated
	Judgment of S.C.

IN THE SUPREME COURT OF THE UNITED STATES

No. 77-836

UNITED STATES, PETITIONER

v.

SMITH JOHN AND HARRY SMITH JOHN

Order Allowing Certiorari

Filed January 16, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with No. 77-575 and a total of one hour is allotted for oral argument.

(13A)

U.S. GOVERNMENT PRINTING OFFICE: 1978

Supreme Court, U. S.
FILED
DEC 14 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 77-575

SMITH JOHN AND HARRY SMITH JOHN,
Appellants,

VS.

STATE OF MISSISSIPPI,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

MOTION TO DISMISS

A. F. SUMMER, Attorney General
By: CATHERINE WALKER UNDERWOOD
Special Assistant Attorney General
P. O. Box 220
Jackson, Mississippi 39205
Attorney for Appellee

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In the Supreme Court of the United States

No. 77-575

SMITH JOHN AND HARRY SMITH JOHN,
Appellants,

vs.

STATE OF MISSISSIPPI,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

MOTION TO DISMISS

The appellee moves the Court to dismiss the appeal herein, first, on the ground that jurisdiction does not lie under 28 U.S.C.A. §1257 (2). Appellants allege without specifying their reasoning that the validity of Miss. Code of 1972 Ann. §97-3-7 (2) (1977) is involved. The opinion below did not hold this statute valid against a claim of unconstitutionality, but rather, looked directly to the issue of jurisdiction and found the United States District Court had no jurisdiction to prosecute these appellants under 18 U.S.C.A. §1153 (Supp. 1976), and these appellants were in the same position as any others tried by a court with no

jurisdiction. A copy of this state statute and the opinion below are before this Court as Appendix to the Jurisdictional Statement.

Second, jurisdiction does not lie under 28 U.S.C.A. §1257 (1). Appellants argue the lower court held unconstitutional, as applied, two Acts of Congress; those being the Indian Reorganization Act of 1934, particularly 25 U.S.C.A. §467 and §479 and the Act of June 21, 1939, Pub.L. 76-147, 53 Stat. 851 which are before this Court as Appendix to the Jurisdictional Statement. The opinion below did not hold either of these acts invalid. The Indian Reorganization Act was construed, and these appellants not found within its scope. No reference to the Act of June 1939, Pub.L. 76-147, 53 Stat. 851 is found in the opinion below, and appellee rejects appellants' assertion that the lower court must necessarily have ruled on the statute implicitly and held it invalid. Any possible consideration of this act by the lower court could not have involved the validity of the act, only its scope in clarifying title to land held by the United States; it had no application to criminal jurisdiction. *United States* v. *State Tax Com'n of State of Miss.*, 535 F.2d 300, 304 (5th Cir. 1976)

Appellee further submits there is no substantial federal question present here. The opinion below rests on an adequate and independent nonfederal ground which is the unique historical and legal background of the Choctaws of Mississippi as outlined in the opinion below and other cases of the Mississippi Supreme Court and Fifth Circuit Court of Appeals, to be cited, which are in agreement that Mississippi has exclusive jurisdiction over all its citizens including its Choctaw citizens. A reading of the Jurisdictional Statement, however, reveals an attempt to appeal these cases simultaneously. The opinion below is correct and no further review is warranted.

FACTS

Appellants were tried and convicted in the Circuit Court of Leake County, Mississippi, for aggravated assault and sentenced to serve two years, with credit on the sentence for eight months and eight days served in jail. They have been admitted to bail by the Mississippi Supreme Court pending disposition of this case. There being no issue as to their guilt of this brutal crime, the only issue remaining is whether the State of Mississippi has criminal jurisdiction to try appellants for the commission of the crime of aggravated assault committed on property owned by the United States and held in trust for the Choctaw Indians. Appellants' convictions for this crime were affirmed by the Mississippi Supreme Court, and this issue answered affirmatively.

ARGUMENT

The issue of criminal jurisdiction over the Mississippi Choctaws has been recently addressed by the Mississippi Supreme Court, in addition to the opinion below, in two specific cases. In *McMillan* v. *State,* 260 So.2d 832 (Miss. 1972), a specially-concurring opinion addressing the jurisdictional question of the Choctaw Indians found that the state courts of Mississippi have jurisdiction of cases involving all citizens of Mississippi, including Indians. This same conclusion was reached by the court in *Tubby* v. *State,* 327 So.2d 272 (Miss. 1976). The Fifth Circuit Court of Appeals also addressed this issue in the case of *United States* v. *State Tax Com'n of State of Miss.,* 505 F.2d 633 (5th Cir. 1974), reh.den., 535 F.2d 300 (5th Cir. 1976), reh. en banc denied, 541 F.2d 469 (5th Cir. 1976) and *United States* v. *John,* No. 76-1518 (United States Court of Appeals, Fifth Circuit, October 11, 1977), a copy of which is attached as Appendix to this Motion. Both courts outlined the status of the Mississippi Choctaws and are in agreement that jurisdiction of Mississippi over its citizens of Choctaw Indian blood stands unimpaired. Particular treaties and statutes uniquely applicable to these individuals and the State of Mississippi were considered in determining congressional intent. *Rosebud Sioux Tribe* v. *Kneip,* 521 F.2d 87 (8th Cir. 1975); *United States Ex Rel. Cook* v. *Parkinson,* 396 F.Supp. 473 (D. S.Dak. 1975). In *United States* v. *John, supra* at 188, the Fifth Circuit Court of Appeals considered the history of the treaties with the Choctaw Indian Tribe culminating in the 1830 Treaty of Dancing Rabbit Creek, 7 Stat. 333, and said:

> It necessarily follows that by the Treaty of Dancing Rabbit Creek the United States deliberately terminated its guardian-ward relationship with the In-

> dians who chose to remain in Mississippi. And there is no doubt that these Indians accepted that termination.

The cession of Indian lands to the government had the effect of disestablishing Indian Country, and jurisdiction belongs to the state wherein the land is located. *Bates* v. *Clark,* 95 U.S. 204, 24 L.Ed. 471 (1877); *Beardslee* v. *United States,* 387 F.2d 280 (8th Cir. 1967); *Ellis* v. *Page,* 351 F.2d 250 (10th Cir. 1965); *Tooisgah* v. *United States,* 186 F.2d 93 (10th Cir. 1950); *Bagby* v. *United States,* 53 F.2d 260 (N.D. Okla. 1931); *State* v. *Williamson,* 211 N.W.2d 182 (S. Dak. 1973). The Choctaw Tribe ceased to exist in Mississippi, and those who stayed in Mississippi became citizens of the state subject to the laws of the state. *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620, 25 L.Ed.2d 615, 90 S.Ct. 1328 (1970); *Choctaw Nation* v. *United States,* 119 U.S. 1, 30 L.Ed. 306, 7 S.Ct. 75 (1886); *Choctaw Nation* v. *United States,* 81 Ct.Cl. 1 (1935); *United States* v. *John, supra; United States* v. *State Tax Com'n of State of Miss., supra; Tubby* v. *State, supra; Fisher* v. *Allen,* 2 How. 611 (Miss. 1837). Similarly situated Indians are found in *Eastern Band of Cherokee Indians* v. *United States,* 117 U.S. 288, 303, 309, 29 L.Ed. 880, 6 S.Ct. 718 (1886). The Fifth Circuit Court of Appeals in *United States* v. *John, supra* at 188 quoted from *United States* v. *Antelope,* ..... U.S. ....., 51 L.Ed.2d 701, 97 S.Ct. 1395, 1399 (1977):

> '[M]embers of Tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act.'

Congress may relinquish its superior power over Indians and subject them to the laws and jurisdiction of state courts. *Bagby, supra.* In *Winston* v. *Amos,* 255 U.S.

373, 65 L.Ed. 684, 689, 41 S.Ct. 342 (1920), this Court reviewed the status of the Mississippi Choctaws, two years after the 1918 relief measure later discussed, and stated:

> The mixed-blood Choctaws who elected to remain in Mississippi were provided for under article 19, while the full bloods who remained and elected to become citizens of the state were provided for under article 14; hence, full-blood Mississippi Choctaws have always been called "14th article claimants." Choctaws who remained in Mississippi under that article adopted the dress, habits, customs, and manner of living of the white citizens of the state. They had no tribal or band organization or laws of their own, but were subject to the laws of the state. They did not live upon any reservation, nor did the government exercise supervision or control over them. No funds were appropriated for their support, though much land was given to them. Neither the Indian Office nor the Department of the Interior assumed or exercised jurisdiction over them, and they never recognized them either individually or as bands, but regarded them as citizens of the state of Mississippi, and the Department held it had no authority to approve contracts made with them.

Pending the negotiation of the treaty, the legislature of the state of Mississippi passed as act, January 19, 1830, abolishing the tribal customs of Indians not recognized by the common law or the law of the state making them citizens of the state, with the same rights, immunities, and privileges as free white persons, extending over them the laws of the state, validating tribal marriages, and abolishing the tribal offices and posts of power. Recognition of their citizenship was afterwards embodied in the state Constitution.

So as this Court recognized in 1921, Mississippi Choctaws were subject to Mississippi law and not identified as a tribe under United States jurisdiction. *United States* v. *State Tax Com'n of State of Miss.*, 505 F.2d at 642 recognized:

> As late as August 31, 1936, as it appears in the record, the Solicitor of the Department of Interior ruled that 'there is in fact no existing tribe of Indians in Mississippi known as the Choctaw Tribe.'

The federal action outlined in the Jurisdictional Statement at pages 6-8 did not establish Indian Country in Mississippi as defined by 18 U.S.C.A. §1151 which appellants assert includes all federal Indian reservations (18 U.S.C.A. §1151a) and all dependent Indian communities (18 U.S.C.A. §1151b). The opinion below found the Choctaws of Mississippi gave up their reservation status and became citizens of the State in 1830. The Jurisdictional Statement further questions whether subsequent federal action establishing a reservation in Mississippi was sufficient to establish Indian Country. 18 U.S.C.A. §1151b has not been drawn in question and is not proper for consideration here. *Cardinale* v. *Louisiana*, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969). No factual evidence was offered to the trial court concerning the criteria in *United States* v. *Martine*, 442 F.2d 1022 (10th Cir. 1971) and none is considered by the opinion below. Mere presence of a group of Indians in an area is insufficient to establish a dependent Indian Community. *State* v. *Cutnose*, 87 N.M. 307, 532 P.2d 896 (Ct.App. 1974).

Appellants are not subject to exclusive jurisdiction of the United States under authority of 18 U.S.C.A. §1153. The land purchase program of the federal government is extensively outlined in cited cases from the lower court and Fifth Circuit Court of Appeals. Briefly, in 1918 money

was appropriated for the Bureau of Indian Affairs. Act of May 25, 1918, 40 Stat. 573. *United States* v. *State Tax Com'n of State of Miss.*, 505 F.2d 633 at 641 states:

> This Act glaringly omits reference to the Mississippi Choctaws as a 'tribe' and omits any mention of a 'reservation'. Obviously, none existed.

The money appropriated under this Act was to be repaid to the government. Clearly, the Indians were not treated as wards and no mention of jurisdiction was made. Those circumstances had not changed in 1921. *Winston* v. *Amos, supra.* Ownership and use of lands, without more, does not withdraw the lands from state jurisdiction. *Silas Mason Co.* v. *Tax Comm. of Washington,* 302 U.S. 186, 82 L.Ed. 187, 58 S.Ct. 233 (1937); *State* v. *Shepard,* 239 Wis. 345, 300 N.W. 905 (1941).

In 1939, the status of the land purchased which was neither continuous nor contiguous, but rather, a series of land holdings in several different counties, was clarified to be held in trust. Act of June 21, 1939, 53 Stat. 851. No tribe was referred to, and no reservation was created. Neither was federal jurisdiction asserted. *United States* v. *John, supra.* The 1940 case of *Choctaw Nation* v. *United States,* 91 Ct.Cl. 320, 358 (1940) gave no judicial recognition to any tribe or reservation in Mississippi. In addition, the 1935 and 1936 cases of *Choctaw Nation* v. *United States,* 81 Ct.Cl. 1 (1935) and *Choctaw Nation* v. *United States,* 83 Ct.Cl. 49 (1936), decided after the Indian Reorganization Act, did not refer to any reservation or tribe in Mississippi. Further, neither the 1934 Indian Reorganization Act nor the 1939 Act established Indian Country in Mississippi. Appellants cite cases for the proposition that Indian Country may be reestablished after statehood, but Congress has not so acted in this case. *United States* v. *John, supra.* Congress has only

acted toward the Mississippi Choctaws as separate members of the departed tribe and as subjects of relief measures.

Appellants, at Jurisdictional Statement page 10, selectively read from the opinion below and call error a quote from *United States* v. *State Tax Com'n of State of Miss.*, 535 F.2d 300 at 302, referring to the 1830 Treaty, as follows: ". . . it cannot be altered by Act of Congress; . . ." It is also referred to at Jurisdictional Statement page 3. This argument was made to the Fifth Circuit Court of Appeals by petition for rehearing en banc and that court further addressed the quote and distinguished the case of *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 47 L.Ed. 299, 23 S.Ct. 216 (1903), on which appellants now rely. In response, appellee relies on the opinion of the Fifth Circuit Court of Appeals in denying the rehearing en banc at *United States* v. *State Tax Com'n of State of Miss.*, 541 F.2d 469.

The Jurisdictional Statement at pages 10 and 11 takes issue with the lower court's statements as to citizenship and tribal status. An emancipated Indian no longer retains his unique status with the federal government and is subject to state laws as any other state citizen. *United States* v. *Heath,* 509 F.2d 16, 19 (9th Cir. 1974). In *United States* v. *Antelope, supra,* citing *Morton* v. *Mancari,* 417 U.S. 535, 41 L.Ed.2d 290, 94 S.Ct. 2474 (1974), consideration was given to whether the Indian was emancipated as well as whether or not the crime occurred on Indian Country. The Treaty of Dancing Rabbit Creek under which Indian Country was disestablished in Mississippi also conferred citizenship on those Indians wishing to remain in Mississippi, and Mississippi so extended her laws.

The Jurisdictional Statement at page 12 asserts a conflict in the reasoning behind the Fifth Circuit's interpretation of the scope of the Indian Reorganization Act

as it pertains to Mississippi Choctaws, referred to by the opinion below, and *Maynor* v. *Morton,* 510 F.2d 1254 (D.C. Cir. 1975). The interpretation in *Maynor,* however, specifically did not confer tribal status on the few individuals who, after extensive research into their group, were found eligible for some of the benefits available to individual Indians under the Act. Clearly, tribal status was an issue in the 1944 Proclamation from the Secretary of the Interior declaring trust lands in Mississippi to be an Indian reservation. *United States* v. *John, supra,* Appendix. The Fifth Circuit did not take issue with benefits to these Indians. *United States* v. *John, supra. Maynor* v. *Morton, supra* did not consider the question of exclusive federal jurisdiction for any reservation created under the Act. A reservation is not necessarily Indian Country. *United States* v. *Celestine,* 215 U.S. 278, 54 L.Ed. 195, 197, 30 S.Ct. 93 (1909). Many racially classified Indians are not within 18 U.S.C.A. §1153. *United States* v. *Antelope, supra.*

Appellants, in an attempt to appeal *Tubby* v. *State, supra,* take issue with that opinion's referral to U.S. Const., art. I §8, cl. 17 citing *United States* v. *McGowan,* 302 U.S. 535, 82 L.Ed. 410, 58 S.Ct. 286 (1938). *McGowan* concerned a dependent Indian community, not in issue here, which was held to be Indian Country within the meaning of a particular statute and was distinguished in *State* v. *Shepard, supra.*

Finally, criminal jurisdiction may be relinquished by the government, *Rosebud Sioux Tribe* v. *Kneip, supra,* and has been in this case. Congressional intent is clear and should not be disregarded. *DeCoteau* v. *District County Court,* 420 U.S. 425, 43 L.Ed.2d 300, 95 S.Ct. 1082 (1975). Public Law 280, 67 Stat. 589 (1953) gave Congressional consent for states to assume jurisdiction

which Mississippi had already assumed with Congressional consent given in 1830. Public Law 280 did not oust existing state jurisdiction. *Norvell* v. *Sangre de Cristo Development, Inc.,* 372 F.Supp. 348 (D. N.M. 1974).

CONCLUSION

For the reasons stated above, appellee respectfully submits the questions and cases upon which appellants rely have been properly settled by the court below, and appellee respectfully moves the Court to dismiss the appeal from the Supreme Court of Mississippi.

Respectfully submitted,

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CERTIFICATE

I, Catherine Walker Underwood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, copies of the foregoing Motion to Dismiss to Richard B. Collins, Native American Rights Fund, 1506 Broadway, Boulder, Colorado 80302 and Edwin R. Smith, Box 467, Philadelphia, Mississippi 39350.

This, the 13th day of December, A. D., 1977.

CATHERINE WALKER UNDERWOOD
Special Assistant Attorney General

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Smith JOHN and Harry Smith John,
Defendants-Appellants.

No. 76-1518.

United States Court of Appeals,
Fifth Circuit.

Oct. 11, 1977.

Mississippi residents of Choctaw Indian blood were convicted before the United States District Court for the Southern District of Mississippi, William Harold Cox, J., of simple assault, and they appealed. The Court of Appeals, Coleman, Circuit Judge, held that: (1) fact that defendants served a jail sentence and discharged their fines before their appeal could be heard did not require dismissal on mootness grounds; (2) lands occupied in Mississippi by its citizens of Choctaw Indian blood are not in "Indian Country" as that term is used in the Major Crimes Act but, rather, citizens of the state of Mississippi of Choctaw Indian blood are subject to inherent police powers of the state anywhere within its exterior boundaries and (4) such determination in no way affects legality of the congressional policy of benevolence towards the Mississippi Choctaws as begun in 1918 and since pursued.

Reversed and remanded.

1. Witnesses (Key) 345(1), 350

Under Mississippi law a witness may be impeached by proof of misdemeanor convictions; however, the witness may be questioned only as to fact of conviction and not as to details of the crime.

2. Criminal Law (Key) 1131(4)

Although before appeal could be heard the defendants, who were Mississippi residents of Choctaw Indian blood, had served jail sentences and discharged fines imposed on federal conviction of simple assault, Court of Appeals would not dismiss the appeal, which raised issue whether federal court had jurisdiction, as moot. 18 U.S.C.A. §§ 113 (a), 1151, 1153.

3. Indians (Key) 36

For an offense to take place within "Indian Country," as the term is used in the Major Crimes Act, the land on which the offense allegedly occurred must be within an Indian reservation and such reservation must be under the jurisdiction of the United States Government. 18 U.S.C.A. §§ 1151, 1153.

See publication Words and Phrases for other judicial constructions and definitions.

4. Indians (Key) 36

Lands occupied in Mississippi by its citizens of Choctaw Indian blood are not in Indian Country; hence, Major Crimes Act did not confer on federal district court subject matter jurisdiction of alleged assault committed by Mississippi residents of Choctaw Indian blood on the Choctaw Indian Reservation. 18 U.S.C.A. §§ 113(a), 1151, 1153; Act June 18, 1934, § 7, 48 Stat. 984.

5. States (Key) 9

Act and resolution admitting Mississippi as a state endowed Mississippi with inherent police power over all territory and inhabitants within its exterior boundaries except where preempted by the federal government. Act March 1, 1817, 3 Stat. 348; Resolution December 10, 1817, 3 Stat. 472.

6. Indians (Key) 38(2)

By the Treaty of Dancing Rabbit Creek the United States deliberately terminated guardian-ward relationship with the Choctaw Indians who chose to remain in Mississippi and since such Indians accepted that termination they are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act. 18 U.S.C.A. § 1153; Treaty with the Choctaws, arts. III, XIV, 7 Stat. 333.

7. Statutes (Key) 158, 159

Repeals by implication are not favored; absent some affirmative showing of an intention to repeal, the only permissible justification for repeal by implication is when the earlier and later statutes are irreconcilable.

8. Statutes (Key) 223.4

Absent clear intention to the contrary, the specific statute will not be controlled or nullified by a general one, regardless of priority of enactment.

9. Indians (Key) 3, 5

Specific provisions of the Treaty of Dancing Rabbit Creek, with reference to the Mississippi Choctaws were not amended, modified or abrogated by Indian appropriation

bill of May 25, 1918, Indian Reorganization Act of June 18, 1934 or Act of June 21, 1939 placing in trust title to land acquired under the 1918 Act and, hence, while citizens of the state of Mississippi of Choctaw Indian blood are, anthropologically, Indians they are nevertheless subject to the inherent police powers of the state anywhere within its exterior boundaries. Act June 18, 1934, §§ 13, 16-18, 48 Stat. 984; Treaty with the Choctaws, art. XIV, 7 Stat. 333; Act May 25, 1918, 40 Stat. 561; Act May 25, 1918, § 9, 40 Stat. 561; Act June 21, 1939, 53 Stat. 851.

10. Indians (Key) 5

Indian Reorganization Act of 1934 was not intended to and does not apply to the Mississippi Choctaws. Act June 18, 1934, § 7, 48 Stat. 984.

11. Indians (Key) 12

Effect of Act of June 21, 1939, placing in trust for the Choctaw Indians residing in Mississippi lands acquired under Indian Appropriation Bill of May 25, 1918, did not, by virtue of Indian Reorganization Act of June 18, 1934, have effect of creating a new reservation since the Reorganization Act was not intended to apply, and does not apply, to the Mississippi Choctaw Indians; Reorganization Act provided no authority for 1944 proclamation of assistant secretary of Indian affairs declaring trust lands to be an Indian Reservation. Act June 18, 1934, §§ 13, 16-18, 48 Stat. 984; Act May 25, 1918, 40 Stat. 561; Act June 21, 1939, 53 Stat. 851.

12. Indians (Key) 7

Fact that Choctaw Indian Reservation in Mississippi is not "Indian Country" does not affect legality of aid being given to Mississippi Choctaws by the federal government;

that which is being done to assist the Mississippi Choctaws does not depend and does not have to depend on the traditional federal guardian-Indian ward relationship. Act May 25, 1918, 40 Stat. 561.

Appeal from the United States District Court for the Southern District of Mississippi.

Before COLEMAN, GODBOLD and HILL, Circuit Judges.

COLEMAN, Circuit Judge.

Smith John and his son, Harry Smith John, are Mississippi residents, of Choctaw Indian blood. In the District Court for the Southern District of Mississippi they were indicted for the commission of a felonious assault, with intent to kill, upon one Artis Jenkins, in violation of 18 U.S.C. §§ 1153 and 113(a). The indictment charged that the defendants were Indians, that the offense was committed in the Northeast Quarter of Section 35, Township 11 North, Range 7 East, Leake County, Mississippi, on the Choctaw Indian Reservation, *on land within the Indian country* and under the jurisdiction of the United States.

At trial, the defendants requested an instruction on simple assault, to which there was no objection. They were convicted of that offense and were sentenced accordingly. This appeal followed.

[1, 2] Before the appeal could be heard these appellants served their 90 day jail sentences and discharged their fines. This suggests that there no longer exists any live case or controversy between these appellants and the United States, that this case is moot and should not be decided here. Were it not for the decision of the Supreme Court in *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), we would be inclined to so hold.

Any possible collateral consequence of these convictions could occur only if the appellants should hereafter be called as witnesses in some criminal prosecution in a state court.[1] Under Mississippi law a witness may be impeached by proof of misdemeanor convictions, *Lewis v. State*, 1904, 85 Miss. 35, 37 So. 497; *Breland v. State*, 1954, 221 Miss. 371, 73 So.2d 267. However, the witness may be asked only as to convictions; not the details of the crime. *Allison v. State*, Miss.1973, 274 So.2d 678; *Murray v. State*, Miss. 1972, 266 So.2d 139; *Mangrum v. State*, Miss.1970, 232 So.2d 703. "Simple assault" includes incidents which amount to nothing more than fisticuffs and if the jury is not allowed to hear the details a conviction on that score could not have much impact on credibility; nevertheless, under *Sibron* we do not feel free to dismiss for mootness.

After their federal convictions, Smith John and Harry Smith John were indicted in the Circuit Court of Leake County, Mississippi, for an aggravated assault on Jenkins, were convicted, and sentenced to serve two years in the state penitentiary, with credit for time spent in jail awaiting trial.

On appeal the State Supreme Court held that the United States District Court did not have jurisdiction to try the defendants under the Major Crimes Act, 18 U.S.C. § 1153, and the State Court convictions were affirmed, *John v. State of Mississippi* (Miss.1977), 347 So.2d 959. See also, *Tubby v. State*, Miss.1976, 327 So.2d 272.

Our Court deferred decision on the instant appeal pending an application of the Solicitor General of the United States for a writ of certiorari in *United States v. State Tax Commission of the State of Mississippi*, 5 Cir. 1974, 505 F.2d 633, *reh. denied*, 535 F.2d 300 (1976), *reh. en banc denied*, 541 F.2d 469 (1976). In that case, which was not a criminal prosecution under 18 U.S.C. § 1153, we held that *the jurisdiction of the State of Mississippi over its citizens of Choctaw Indian blood stands unimpaired.* On April 5, 1977, we were notified that the Acting Solicitor General had decided not to seek certiorari. He felt that the Court had incorrectly concluded that the Mississippi Choctaws are not a tribe but that this was unnecessary to the Court's resolution of the State Tax Commission controversy.

1. The convictions could not be used for impeachment in federal prosecutions, Rule of Evidence 609.

I

Jurisdiction

The threshold issue in this appeal is one of jurisdiction: did the assault on Jenkins take place "in Indian Country"?[2]

[3] 18 U.S.C. § 1151, a product of the general revision of 1948, says that "Indian Country" shall include "all lands within the limits of any Indian Reservation under the jurisdiction of the United States government". The requirement is two-fold. The land must be within an Indian Reservation and the Indian Reservation must be under the jurisdiction of the United States government.

2. 18 U.S.C., § 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139, § 25, 63 Stat. 94.

The quarter section of land, one half mile square, on which Jenkins was assaulted cannot be an Indian Reservation under the jurisdiction of the United States, and thus in "Indian Country", unless this was the kind of reservation to which Congress intended that § 1151 should apply—and only then if it was under the jurisdiction of the United States government by virtue of a Proclamation of the Acting Secretary of the Interior, dated December 4, 1944, purporting to act under the authority of § 7 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984.

[4] We hold that the lands occupied in Mississippi by its citizens of Choctaw Indian blood *are not* in Indian Country; therefore, 18 U.S.C. § 1153[3] did not confer subject matter jurisdiction on the District Court.

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3. 18 U.S.C., § 1153. Offenses committed within Indian country.

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

As used in this section, the offenses of rape and assault with intent to commit rape shall be defined in accordance with the laws of the State in which the offense was committed, and any Indian who commits the offenses of rape or assault with intent to commit rape upon any female Indian within the Indian country shall be imprisoned at the discretion of the court.

As used in this section, the offenses of burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed. (June 25, 1948, ch. 645, 62 Stat. 758; May 24, 1949, ch. 139, § 26, 63 Stat. 94; Nov. 2, 1966, Pub.L. 89-707, § 1, 80 Stat. 1100; Apr. 11, 1968, Pub.L. 90-284, title V, § 501, 82 Stat. 80.)

(Statute which was in effect on August 30, 1975, the date of the alleged offense.)

The convictions are reversed and the cause remanded, with directions to set aside the convictions and dismiss the indictment.

II

By the Enactment of 18 U.S.C., §1151, Congress Specifically Sought to Avoid the Confusion of Checkerboard Jurisdiction, *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962).

On December 4, 1944, the Assistant Secretary of the Interior signed a proclamation [Federal Register, December 23, 1944, page 14,907] declaring that the Indian trust lands composed of many comparatively small, non-contiguous tracts in the Mississippi Counties of Attala, Jones, Leake, Neshoba, Newton, and Scott are "an Indian reservation for the benefit of those members of the Mississippi band of Choctaw Indians, of one-half or more Indian blood, resident in Mississippi, and enrolled at the Choctaw Indian Agency as aforesaid".

The 1944 Proclamation of the Assistant Secretary will be annexed to this opinion. It will be noted that the land descriptions there set forth are filled with indefinite descriptions, such as "less 10.4 acres off the northeast part thereof", "5 acres off the east end thereof", "less 14 acres on the East side", "less 10 acres in the southwest corner", and these indefinite descriptions bristle throughout the entire description of the "reservation" which the Assistant Secretary was attempting to establish. Moreover, a comparison of sections, townships, and ranges clearly indicate that in numerous instances, even within the same county, there were not contiguous parcels of land and, in the entirety, they were scattered over several counties.

The situation is pointed up by the fact that the indictment in this case had to specify that the alleged offense occurred on a particular quarter section of land in Leake County, the Northeast ¼ of Section 35, Township 11 North, Range 7 East, an area 880 yards square.

We have not attempted to map, county by county, the lands described in the Secretary's proclamation, section by section, township by township, and range by range. We do have before us the government's Supplemental Exhibit Number 3 filed in the case of *United States v. State Tax Commission, supra,* purporting to be a map of Indian reservation land in the Counties of Leake, Newton, Neshoba, and Kemper.

The map shows the "Red Water" and "Standing Pine" Indian Reservations in Leake County; the "Connehatta" Reservation in Newton County; the "Pearl River" and "Tucker" Reservations in Neshoba County; and the "Bogue Chitto" Indian Reservation in Kemper County.

The Red Water Reservation is composed of seven non-contiguous tracts; the Standing Pine Reservation is composed of five non-continguous tracts; the Connehatta Reservation is composed of what appears to be nine non-contiguous tracts; the Pearl River Reservation seems to be composed of several non-contiguous tracts, the actual boundaries of which we cannot discern from the map; and the Bogue Chitto Indian Reservation is composed of at least four non-contiguous tracts. These five Reservations are dispersed over an area encompassing twelve hundred square miles in four counties.

In 1961, in an opinion by Mr. Justice Black, the Supreme Court held that by the enactment of 18 U.S.C., § 1151, Congress sought to avoid the confusion which would be caused by an impractical pattern of checkerboard

jurisdiction which would require law enforcement officers in the area to search tract books to determine whether criminal jurisdiction over a particular offense did or did not exist, *Seymour v. Superintendent,* 1961, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346.

An examination of the land descriptions set forth in the Proclamation of the Assistant Secretary (annexed hereto) reveals that he did, in fact, proclaim an impractical checkerboard, exactly the kind which Congress sought to avoid when it enacted the revised 1948 statute defining "Indian Country".

This checkerboard was in existence, but it was not Indian Country, when Congress passed the 1948 revised statute. Since this widely dispersed disarray of small subdivisions of land, scattered in clusters throughout several Mississippi counties, was already in existence in 1948 and Congress sought to avoid just such a situation when it enacted 18 U.S.C., § 1151, defining Indian Country, it is apparent that by the enactment of the statute Congress could not have intended it to apply to the Choctaw Indian "reservation" in Mississippi. Congress could not have had any idea that it was converting a conglomeration of such tracts into "Indian Country".

We accordingly hold that the definition in the statute does not put these lands in Indian Country.

III

"[M]embers of Tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act."

United States v. Antelope, 1977, ... U.S. ....., 97 S.Ct. 1395, 1399, 51 L.Ed.2d 701 (Footnote 7).

A

THE TERMINATION OF THE CHOCTAW INDIAN TRIBE IN MISSISSIPPI, 1830

[5] Our starting point is the Act of March 1, 1817, and the Resolution of December 10, 1817, 3 Stat. 348, 472, admitting Mississippi as the Twentieth State of the American Union on an equal footing with the other states. This endowed the State with inherent police power over all territory and inhabitants within its exterior boundaries except where preempted by the federal government. From 1817 to 1830 Mississippi state police power over the Choctaw Indian Tribe, and the lands it occupied, may be said to have been pre-empted by the national government. Nevertheless, by the Treaty of Dancing Rabbit Creek the United States formally relinquished that pre-emption.

Prior to the year 1871, the United States in its dealings with the various Indian tribes customarily resorted to treaties which were formally ratified by the United States Senate. Before the year 1830 the United States had made at least eight treaties with the Choctaw Indian Tribe. See detailed tabulation, *United States v. State Tax Commission of the State of Mississippi, supra,* 505 F.2d at 639. The final treaty before the Tribe moved to the Indian Territory was signed September 27, 1830, on Dancing Rabbit Creek, near present day Macon, Mississippi. Except for the preamble, the Senate ratified the treaty on February 24, 1831, 7 Stat. 333. The Tribe ceded 10,500,000 acres, the last of its Tribal domain in Mississippi, from which nineteen counties were later formed.

Article III of the Treaty specified that "[T]he Choctaw nation of Indians *consent* (emphasis ours) and hereby cede to the United States, the entire country they own and possess, east of the Mississippi River; and they agree

to move beyond the Mississippi River, early as practicable . . .".

The Treaty, however, required no Choctaw to leave his ancestral home. Permission to remain and become citizens of the states was expressly granted in Article XIV:[4]

> "Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so . . ."

Historians agree that this was a concession to the members of the Tribe who lived in fixed habitations, who strongly opposed leaving their homes, and that without this concession tribal consent to the treaty could not have been obtained.[5]

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4. Article XIV.

Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the Agent within six months from the ratification of this Treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one half that quantity for each unmarried child which is living with him over ten years of age; and a quarter section to such child as may be under 10 years of age, to adjoin the location of the parent. If they reside upon said lands intending to become citizens of the States for five years after the ratification of this Treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvement of the head of the family, or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity.

5. Hearings on the Treaty of Dancing Rabbit Creek before a Subcommittee of the Committee on Indian Affairs on H.R. 19,213 (February 14-March 19, 1912, 151 pages):

"The civilized Indians were opposed to the removal because they loved their homes and did not desire to return to the barbaric life", p. 16.

"The insertion of the fourteenth article, as conclusively shown by contemporaneous testimony, was the only method by which the treaty could have been concluded", p. 17.

In the beginning, one third of the Choctaws elected to remain in Mississippi; the others were moved West in 1831, 1832, and 1833. Sporadic migration continued, however, and by 1900 only 2,000 remained in Mississippi, scattered over several Central Mississippi counties.[6] Greenwood Leflore, the head chief of the Choctaw Tribe, chose not to go West, became an immensely wealthy man, and exercised his Mississippi citizenship by serving with distinction in the Mississippi Legislature.[7]

Long before 1850 the land not retained by individual Indians under Article XIV had been sold by the government at its land offices in Columbus and Paulding to private purchasers, with patents issued accordingly.

In 1921 the Supreme Court exhaustively reviewed the *post* treaty status of the Mississippi Choctaws, *Winton v. Amos,* 255 U.S. 373, 41 S.Ct. 342, 65 L.Ed. 684 (1921). The High Court stated that those Choctaw Indians remaining in Mississippi after the Treaty

1. Were subject to the laws of the State, and

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6. McLemore, A History of Mississippi, 1973, p. 88. Anyone interested in the history of this noble tribe of Red men should read DeRosier, The Removal of the Choctaw Indians, U. of Tennessee Press, 1970; Debo, The Rise and Fall of the Choctaw Republic, U. of Oklahoma Press, 1961; Foreman, Indian Removal, U. of Oklahoma Press, 1953; Foreman, The Five Civilized Tribes, U. of Oklahoma Press, 1934.

7. As a Senator, the former Chief grew tired of the well educated Senators sprinkling their speeches with lengthy quotations in Latin and Greek. He retaliated by making a speech in Choctaw, which put a stop to the former practice. He could afford to spend $75,000 of his own funds to construct a road from his home, Malmaison, in Carroll County, to his boat docks on the Yazoo. He declined to support the Confederacy. On his death bed (1866) he insisted that the United States flag be held before his eyes so that it would be the last object he saw on earth. A County (Leflore) and a City (Greenwood) were later named for him. It was the proud, and accurate, boast of the Choctaws that they had never made war on the white man; whereas, their sister tribe, the Chickasaws, delighted in fiercely thrashing the whites on the battlefield, which they often did.

2. Did not live on any reservation.

By signing and ratifying the Treaty, Congress and the Indians intended and understood that the United States:

1. Formally relinquished its preemptive jurisdiction over these Indians who chose to remain in Mississippi, as well as over the lands they formerly occupied; and

2. Removed the pre-emption impediment to the police power of the State over the former Indian lands and the inhabitants thereof.

The State forthwith began the exercise of that power, previously asserted in a statute enacted in 1829, and thereafter uninterruptedly exercised it, all of which went unquestioned by either the federal government or the resident Indians for more than a hundred years, see *Rosebud Sioux Tribe v. Kneip, Governor of South Dakota,* 1977, ... U.S. ....., 97 S.Ct. 1361, 1371-72, 51 L.Ed.2d 660; *DeCoteau v. District County Court for Tenth Judicial District,* 1974, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300.

B

In *Winton v. Amos, supra,* the Supreme Court further stated that the Choctaw Indians remaining in Mississippi:

1. Had no tribal or band organization or laws of their own;

2. The Indian Office and the Department of the Interior (1) regarded these Indians as citizens of Mississippi, (2) assumed and exercised no jurisdiction over them, and (3) never recognized them either individually or as bands.

255 U.S. at 378, 41 S.Ct. at 344.

[6] It necessarily follows that by the Treaty of Dancing Rabbit Creek the United States deliberately terminated its guardian-ward relationship with the Indians who chose to remain in Mississippi. And there is no doubt that these Indians accepted that termination.

> "[M]embers of Tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act."

United States v. Antelope, ... U.S. ....., 97 S.Ct. 1395, 1399, 51 L.Ed.2d 701. (Footnote 7) (1977).

Antelope cited *United States v. Heath*, 9th Cir. 1974, 509 F.2d 16, 19: "While anthropologically [an] Indian even after the Termination Act obviously remains an Indian, his unique status vis-a-vis the Federal Government no longer exists".

> "That Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress, is also declared in *Choctaw Nation v. United States*, 119 U.S. 1, 27, [7 S.Ct. 75, 30 L.Ed. 306, 314,] and *Stephens v. Choctaw* [*Cherokee*] *Nation*, 174 U.S. 445, 483, [19 S.Ct. 722, 43 L.Ed. 1041]."

Lone Wolfe v. Hitchcock, 187 U.S. 553, 567, 23 S.Ct. 216, 222, 47 L.Ed. 299 (1903).

"Federal regulation of Indian tribes . . . is not to be viewed as legislation of a 'racial' group consisting of 'Indians' ", *United States v. Antelope, supra*, 97 S.Ct. at 1399, citing *Morton v. Mancari*, 417 U.S. 535, at 553, n. 24, 94 S.Ct. 2474, 41 L.Ed.2d 290.

C

We need not reach or decide whether Congress has the power to reconvert emancipated Indians into wards of the government, or whether once Congress has liquidated Indian tribal status it may reestablish it regardless of intervening history, nor need we decide whether Congress may withdraw a state's police powers over territory or inhabitants once it has been conferred.

Indeed, a diligent search of the statutes has failed to unearth a single instance anywhere in the United States in which Congress has attempted such an act in connection with emancipated Indians, nor have we found any case holding that once Congress totally emancipates an Indian and remands him to the reserved police powers of a state it may thereafter at its unilateral pleasure reassume paramount, plenary jurisdiction over him and the land on which he lives in derogation of the interveningly conferred police power of the state in which the Indian resides.

Quite to the contrary, for over fifty years Congress was persistently pressed to amend, modify, or abrogate provisions of the Dancing Rabbit Treaty with reference to the Mississippi Choctaws and it uniformly declined to do it. The detailed story of these efforts and their corresponding failures appears in *Winton v. Amos, supra.* See also, Hearings on the Treaty of Dancing Rabbit Creek before a Subcommittee of the Committee on Indian Affairs, U. S. House of Representatives on H.R.19213 (February 14-March 19, 1912, 151 pages). See, also, the detailed history recited by Rep. Scott Ferris of Oklahoma on the floor of the House, Congressional Record, Sixty Fifth Congress, Second Session, Vol. 56, part 2, page 1140.

Mr. Ferris asserted that four Secretaries of the Interior, the Dawes Commission, and the House of Representa-

tives, four times by affirmative vote, had held that the Choctaw Indians who remained in Mississippi were not entitled to share in the Indian lands of Oklahoma.

Section 13 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, recognized that the Choctaw Indian Tribe was located in the State of Oklahoma and the Tribe was expressly excluded from the provisions of §§ 16, 17, and 18 of the Act for reorganization and self government.

The Gratuity of 1918

The illustrious John Sharp Williams (assisted by Honorable Pat Harrison and others then members of an outstandingly able Mississippi delegation in the House of Representatives) labored diligently for years to obtain congressional relief for the Mississippi Choctaws as a matter of right under Article XIV. These efforts failed.

At long last, 88 years after the Treaty of Dancing Rabbit Creek, relief came, not as a matter of right but as a gratuity, in the Indian appropriations bill of May 25, 1918, 40 Stat. 561, 562.[8] The bill referred to the "full-

8. For the relief of distress among the full-blood Choctaw Indians of Mississippi, including the pay of one special agent, who shall be a physician, one farmer, and one field matron, $5,000; for their education by establishing and maintaining day schools including the purchase of land and the construction of necessary buildings, $20,000; for the purchase of lands, including improvements thereon, not exceeding eighty acres for any one family, for the use and occupancy of said Indians, to be expended under conditions to be prescribed by the Secretary of the Interior for its repayment to the United States, under such rules and regulations as he may direct, $25,000; for the purpose of encouraging industry and self-support among said Indians and to aid them in building homes, in the culture of fruits, grains, cotton, and other crops, $25,000, which sum may be used for the purchase of seed, animals, machinery, tools, implements, and other equipment necessary, in the discretion of the Secretary of the Interior, to enable said Indians to become self-supporting, to be expended under conditions to be prescribed by the said Secretary for its repayment to the United States on or before June thirtieth, nineteen hundred and twenty-five; in all, $75,000, to be immediately available.

40 Stat. 573, § 9.

blood Choctaw Indians of Mississippi" and to "the relief of [their] distress". It did not refer to them as a tribe. It does not mention a reservation, for there was none. The Commissioner of the Bureau of Indian Affairs, pursuant to a prior appropriation, had been sent to investigate the condition of the Mississippi Choctaws and had formally reported that they did not live on a reservation and he expressly declined to recommend that Congress create one.[9] The bill says nothing about halting state police power over the Indians.

The appropriation was what it declared itself to be: a relief measure, limited to individual Choctaws of the full blood. Only $75,000 was appropriated and it was provided that portions of that sum should be repaid by the Indians, although it appears that almost no repayment was ever made.

Representative Charles D. Carter, born in 1868 near Boggy Depot, in the Choctaw Nation, Indian Territory, said on the floor of the House that *the appropriation was a gratuity.* Congressional Record, Sixty-fifth Congress, Second Session, Vol. 56, part 2, page 6686.

Rather than reflecting a Congressional purpose to amend the Treaty, the lengthy debate on this appropriation

9. According to the Commissioner's report he spent a great deal of time visiting the Indians, particularly in the Counties of Neshoba and Newton. He reported that "the Choctaws of Mississippi have a very good name as regards honesty, truthfulness. cleanliness, and general morality", adding that "I am not prepared to advocate a reservation for these people".

The Commissioner told that he had asked an aged Choctaw how he would like it if the government were to provide him with a team of mules and a wagon. The Indian replied that he would prefer to continue using the hoe because it did not eat and would not be taxed. From the vantage point of 1977 it would appear that this elderly Red Man was in some respects a very wise individual.

Congressional Record, Sixty-fifth Congress, Second Session, Volume 56, Part 2, Page 1138.

demonstrated a fixed Congressional purpose not to alter the Dancing Rabbit Treaty insofar as it pertained to the Mississippi Choctaws.

It is hardly a matter of surprise that, smothered like their white brethren with a hazardous cotton economy and with discriminatory freight rates which stifled industrial development, within a period of nearly twenty years the Mississippi Choctaws paid only $295.11 on the lands which the government bought for them. Congress found it advisable to *place title* to the 3,009 acres acquired under the Act of May 25, 1918, and subsequent similar acts, in the United States "in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior", Act of June 21, 1939 [53 Stat. 851].[10]

This, of course, freed the lands from local, county, and state ad valorem taxation, like other federally owned land, but neither the Committee Report nor the Act says that the emancipated Mississippi Choctaws were thereby made an Indian tribe, or that the lands were to constitute an Indian Reservation (widely scattered as they were), or that Congress was attempting to oust the State of its

10. AN ACT

To define the status of certain lands purchased for the Choctaw Indians, Mississippi.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title to all lands purchased by the United States for the benefit of the Choctaw Indians of Mississippi under authority contained in the Act of May 25, 1918 (40 Stat.L., 573), and similar subsequent Acts not under contract for resale to Choctaw Indians, or on which existing contracts of resale may hereafter be cancelled, is hereby declared to be in the United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior.

Approved, June 21, 1939.

police power over either the land or individual Indians, any of which could easily have been stated if Congress had had such a purpose.

The Assistant Secretary's 1944 Proclamation, discussed *ante,* was yet five years out in the future. The 1948 Indian Country statute, 18 U.S.C. § 1151, was nine years off. We cannot strain for the implication that Congress in 1939 anticipated either occurrence. The Secretary's letter to the Committee mentioned the possibility that some time in the future these Indians might organize under the Indian Reorganization Act of 1934, but he emphasized that the present purposes of the proposed legislation were that (1) all the Indians could be treated alike, (2) that administrative problems would be avoided, and (3) a more productive use of the lands could be sought. To assume that Congress acted on mere possibilities of future events would be pure speculation.

[7, 8] It is a cardinal rule that repeals by implication are not favored, that in the absence of some affirmative showing of an intention to repeal the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable, and in the absence of a clear intention to the contrary a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment, *Morton v. Mancari, supra,* 417 U.S. at 550-51, 94 S.Ct. at 2482, 2483.

[9] We therefore hold that the specific provisions of the Treaty of Dancing Rabbit Creek with reference to the Mississippi Choctaws were not amended, modified or abrogated by the within described Acts of Congress, 1918-1939. We further hold that while the citizens of the State of Mississippi of Choctaw Indian blood are, anthropologically, Indians they are nevertheless subject to the inherent police powers of the State anywhere within its exterior boundaries.

D

The Secretary's Proclamation of December 4, 1944, Does Not Alter the Result

Notwithstanding the considerations hereinabove discussed, the government argues that

> "However, a new reservation involved in this case was established in 1939, pursuant to § 7 of the Indian Reorganization Act of June 18, 1934 . . . for those Choctaws, of one half or more Indian blood, remaining in Mississippi." (Brief, p. 23).

[10] The insuperable difficulty with this contention is that the Indian Reorganization Act of 1934 was not intended to apply, and does not apply, to the Mississippi Choctaws.

As the unanimous opinion in *Morton v. Mancari, supra,* pointed out, 94 S.Ct. at 2478, the *overriding purpose* of the Act was to establish machinery whereby *Indian tribes* would be able to assume a greater degree of self government; that Congress was seeking to modify the then-existing situation whereby the Bureau of Indian Affairs "had plenary control, for all practical purposes, over the lives and destiny of the *federally recognized Indian tribes* (emphasis ours)."

The Court further said that the ultimate solution adopted by the Act was "to strengthen tribal government while continuing the active control of the [Bureau of Indian Affairs], with the understanding that the Bureau would be more responsive to the interests of the people it was created to serve". *Ibid.*, at 2479.

Quite obviously, Congress in 1934 was legislating for Indians in the government-guardian-ward relationship, and not for long emancipated individuals outside that relationship.

[11] We therefore conclude that the Indian Reorganization Act is of no relevancy to the appropriate disposition of this case. It provided no authority for the Proclamation of the Assistant Secretary in 1944. For that reason alone, the reservations of the Mississippi Choctaws are not in "Indian Country".

And, even if the Assistant Secretary did have that authority, there is nothing in the 1934 Act evidencing an intent on the part of Congress to amend, modify or abrogate the Treaty of Dancing Rabbit Creek or, at one fell swoop, to erase a century of history.

IV

This raises the cry in the briefs that the Court is annulling the reservations for the Mississippi Choctaws and invalidating the connection being maintained with and for the Mississippi Choctaws by the United States government.

As will shortly be seen this is not at all so.

V

> "[C]ourts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."

Morton v. Mancari, 417 U.S. 535, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290.

The position of the government is that we should look at this case with one eye closed. It plays down the irrefutable fact that sixty years ago Congress decided to embark upon a policy of benevolences and gratuities to the Mississippi Choctaws, not as a matter of right, not because of the existence of the government-guardian-ward relationship which ordinarily implies pre-emption and exclusive jurisdiction, but because, as the 1918 debates unmistakably show, Congress had come to the conclusion that these people, the long separated remnant of a noble tribe of Red Men, were morally entitled to help. By its annual appropriations Congress knows that the funds are being administered by the executive offices of the government, that the appropriations for the Mississippi Choctaws are being administered with a "reservation" approach, and that affairs are being conducted as if the Indian Reorganization Act of 1934 did apply. All this is policy inaugurated and implemented by the Executive, in which Congress has concurred so far as appropriations go, without Congress manifesting the slightest suggestion that an attempt to abrogate Mississippi police power over this relatively small number of citizens and over the fragmented "reservations" is a prerequisite to what is being done as a moral, rather than legal, obligation. The 1918 policy was begun at a time when Congress knew that the Mississippi Choctaws had been emancipated in 1831, were not an Indian tribe, and had no reservation. The congressional policy of helping these people simply does not depend on the 1934 Act or the 1939 Act or the 1944 Proclamation, vainly invoked by the government in an effort to support its contention that this is Indian Country.

[12] Our holding that this is not Indian Country in no way affects the legality of the aid being given this group. What Congress is doing here in no way differs

from federal aid to drouth-stricken farmers or to flood stricken communities or to small business men or to anybody else for whom Congress finds a good reason to extend the assistance of the taxpayers represented by it. That which is being done to assist the Mississippi Choctaws does not depend, and it does not have to depend, on the traditional "federal guardian"—"Indian ward" relationship.

VI.

The Result

We hold that the lands in the various tracts of the Mississippi Choctaw Indian "Reservation" are not within "Indian Country", as contemplated by 18 U.S.C. §§ 1151, 1153. We further hold that to date the inherent police power of the State of Mississippi over its emancipated Indian citizens of Choctaw blood stands unimpaired. This, however, has nothing to do with the legality of the congressional policy of benevolence toward the Mississippi Choctaws as begun in 1918 and since pursued.

The District Court was without subject matter jurisdiction of these prosecutions

The convictions are reversed. The case will be remanded to permit the District Court to set them aside and dismiss the indictment.

REVERSED and REMANDED.

APPENDIX

Office of Indian Affairs.

Lands Acquired for the Benefit of Choctaw Indians in Mississippi

PROCLAMATION

Whereas, prior to June 18, 1934, and pursuant to authority of and with funds made available by the act of May 25, 1918 (40 Stat. 573), and several subsequent similar acts, approximately 3,550 acres of lands in Mississippi were purchased for the use and benefit of Choctaw Indians of that State;

And whereas, the act of June 21, 1939 (53 Stat. 851) provides:

That title to all lands purchased by the United States for the benefit of the Choctaw Indians of Mississippi, under authority contained in the Act of May 25, 1918 (40 Stat.L., 573), and similar subsequent Acts, not under contract for resale to Choctaw Indians, or on which existing contracts of resale may hereafter be canceled, is hereby declared to be in the United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior.

And whereas, on March 30, 1935, the Choctaw Indians resident in Mississippi, of one-half or more Indian blood, pursuant to section 19 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) voted to accept the provisions of that act, and subsequently pursuant to Section 5 of said act, approximately 11,600 acres of additional land in Mississippi have been acquired for the use and benefit

of the Choctaw Indians of one-half or more Indian blood, resident in that State, the title having been taken in the name of the United States in trust for said Choctaw Indians;

And whereas, none of the previously acquired lands for the benefit of the aforesaid Choctaw Indians is now covered by any outstanding contract or contracts for the resale of any part thereof to any Choctaw or other Indian;

Now therefore, by virtue of the authority contained in the act of June 21, 1939, and in section 7 of the act of June 18, 1934, I hereby declare that the lands in Mississippi acquired by the United States prior to June 18, 1934, for the benefit of the Choctaw Indians of that State are now held in trust by the United States for the benefit of those Choctaw Indians of one-half or more Indian blood resident in that State on January 1, 1940, as shown by the census rolls of the Choctaw Indian Agency, Mississippi, and such other Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as the recognized tribal authorities of the Mississippi Band of Choctaw Indians, with the approval of the Secretary of the Interior, find to be entitled to membership therein; and I hereby further declare that the approximately 11,600 acres of additional land in Mississippi, acquired since June 18, 1934, for the benefit of the Choctaw Indians of that State are hereby added to the land previously acquired and such lands are hereby declared to be an Indian reservation for the benefit of those members of the Mississippi Band of Choctaw Indians, of one-half or more Indian blood, resident in Mississippi and enrolled at the Choctaw Indian Agency as aforesaid.

For convenient identification a legal description of the areas of land acquired for the benefit of the Choctaw Indians and covered hereby, is hereto appended as Ex-

hibit A which is made a part hereof to the same extent as though set forth in full herein.

Done at the City of Washington, District of Columbia, this 4th day of December, 1944.

OSCAR L. CHAPMAN,
Assistant Secretary.

EXHIBIT A—LANDS ACQUIRED FOR THE BENEFIT OF THE CHOCTAW INDIANS IN MISSISSIPPI

Lands Acquired Prior to 1934
Attala County—Choctaw Meridian

	Area (acres)
T. 13 N., R. 7 E.:	
Beginning 26 chains and 50 links due south of the NE corner of Sec. 3 which corner is evidenced by a Sweet Gum 12 I.D. N. 2 degrees E. 25 links; and a Post Oak 20 I.D. S. 36 degrees W. 66 links on Section line between sections 2 and 3, T. 13, R. 7 E., and running thence due west 3 chains and 31 links to NW corner of this block which is evidenced by a pine 12 I.D. S. 67 degrees East and Ash 12 I.D. S. 7 degrees, East 38 links. Thence due south 26 chains and 50 links to SW corner of said block, which is evidenced by a Cherry 4 I.D. S. 39 degrees, East 22 links, and a Red Elm S. 77 degrees, East 24 links, both being on West bank of ditch. Thence due east 15 chains and 11 links to SE corner of said block, which is evidenced by a Red Elm 12 I.D. N. 13 degrees, West 8 links, and a	

	Area (acres)
Sweet Gum 12 I.D. due North 12 links, thence due north 26 chains and 50 links, to NE corner of said block, which is evidenced by a Sweet Gum 6 I.D. S. 69 degrees, East 3 links, on East side of ditch and a Sweet Gum 4 I.D. S. 45 degrees West 12 links, making the corner in the center ditch. Thence due West 11 chains and 80 links to point of beginning. Containing by survey 40 acres. 31 27/100 acres being partly in W½NW¼ and partly in W½SW¼ of Sec. 2 and 8 73/100 acres partly in NE¼ corner of E½SE¼ and E½NE¼ of Sec. 3. All bearings by Choctaw Cession of 1830	40
Jones County—St. Stephens Meridian	
T. 9 N., R. 10 E.:	
Sec. 4, SW¼NW¼ and that part of NE¼-SW¼ which lies north of the old Shubuta and Ellisville Road	50
Sec. 5, SE¼NE¼	40
T. 10 N., R. 10 E.:	
Sec. 34, NE¼NE¼, N½NE¼NW¼, W½-NW¼NW¼, NE¼NW¼NW¼, S½NW¼, N½NE¼SW¼, S½SW¼NE¼, N½NW¼-SE¼	230
	320

	Area (acres)
Leake County—Choctaw Meridian	
T. 9 N., R. 8 E.:	
Sec. 2, NE¼SW¼, W½NW¼, SE¼NW¼ less 10 1/7 acres off the NE part thereof	149 6/7
T. 10 N., R. 8 E.:	
Sec. 26, S½NW¼SE¼, E½SW¼, 5 acres off the east end of S½NW¼SW¼	105
Sec. 34, S½SE¼ less 14 acres on the East side, NW¼NE¼, N½SE¼	186
Sec. 35, NE¼SW¼	40
T. 11 N., R. 7 E.:	
Sec. 23, SW¼NE¼ less 10 acres in SW corner, one acre in NE corner of NW¼-SE¼ and 1 acre in NW corner of NE¼-SE¼	32
Sec. 26, W½SW¼SW¼, NW¼NW¼, N½-NE¼	140
Sec. 27, NE¼NE¼, E½SE¼	120
Sec. 35, SW¼SE¼, S½NW¼SE¼ less 2 acres on east side, E½NE¼, NW¼NE¼, NE¼SE¼ less 10 acres on east side	208
Sec. 36, W½NW¼NW¼, SW¼NW¼	60
	1,040 6/7
Neshoba County—Choctaw Meridian	
T. 10 N., R. 11 E.:	
Sec. 5, S½NE¼	80
Sec. 6, NW¼SE¼ less 1 acre in NE corner	89

	Area (acres)
T. 10 N., R. 12 E.:	
Sec. 17, SE¼SE¼	40
Sec. 20, N½NE¼, SE¼NE¼	120
T. 11 N., R. 10 E.:	
Sec. 23, SE¼SE¼	40
Sec. 24, W½W½SW¼	40
Sec. 25, SW¼SE¼, NW¼NW¼, SE¼-SW¼, W½SW¼, 12 acres off south end of NW¼SW¼	172
Sec. 27, W½SW¼	80
Sec. 36, N½NE¼NE¼, E 60 acres of E½-NW¼, N 2 acres of S½NE¼NE¼	82
T. 11 N., R. 11 E.:	
Sec. 19, SE¼SE¼, SW¼SE¼, E½E½-NW¼, S½SE¼SW¼, W½NW¼SE¼	160
Sec. 30, NE¼	160
Sec. 31, N½NW¼	80
T. 11 N., R. 13 E.:	
Sec. 1, NE¼SW¼	40
Sec. 2, E½NW¼, W½NE¼	160
Beginning at NE corner of Sec. 2 running South 740 yards, thence west 75 yards, thence north 43 yards, thence west 365 yards, thence north 697 yards to north line of Sec. 2, thence east 440 yards to place of beginning	63.9

	Area (acres)
T. 12 N., R. 13 E.:	
Sec. 35, S½SE¼	80
Sec. 36, W½SE¼ less 4 acres in SE corner	76
	1,512.9

Newton County—Choctaw Meridian

T. 7 N., R. 10 E.:	
Sec. 2, W½NW¼, N½SW¼	160
Sec. 3, NE¼, N½SE¼, SE¼SW¼	280
Sec. 10, NW¼NW¼ less 10 acres off south side	30
Sec. 11, NE¼SW¼	40
Sec. 14, S½SW¼	80
Sec. 15, S½SE¼NW¼, N½SW¼, SW¼-NW¼ less 5 acres in NE corner, 2 acres in NE corner of SE¼SW¼	137
Sec. 23, NE¼NW¼	40
	767

Land Acquired Subsequent to 1934

Kemper County—Choctaw Meridian

T. 11 N., R. 14 E.:	
Sec. 7, W½SW¼	80
Sec. 18, strip 1 acre wide and 3 acres long in NW corner NW¼NW¼	3
T. 11 N., R. 16 E.:	
Sec. 7, N½SE¼, NE¼SW¼, N½SE¼SW¼	140
	223

	Area (acres)

Leake County—Choctaw Meridian

T. 11 N., R. 7 E.:	
Sec. 23, S½SE¼ lying east of Carthage-Kosciusko Highway, containing 15 acres more or less; N½SE¼ less 1 acre in SW corner thereof, less about 2 acres beginning at NE corner of NW¼SE¼; thence west 25 yards; thence south 97 yards; thence east 100 yards; thence north 97 yards; thence west 75 yards to point of beginning; SW¼SW¼NE¼; 4 acres in NE corner of NE¼SW¼	106
S½SE¼ lying west of Carthage-Kosciusko Federal Highway, about 65 acres more or less, and 1 acre in SW corner of NW¼-SE¼	66
Sec. 35, All that part of NW¼SE¼ which lies east of old Thomastown Road, 10 acres more or less, and tract of 15 acres more or less, situated in NW corner of NW¼SE¼, described as beginning at NW corner of said NW¼SE¼ and run south 220 yards, thence east to old Thomastown Road, thence in NW course along said road to the north line of said NW¼SE¼, thence west to point of beginning	25
Sec. 36, W½SW¼SE¼	20
T. 10 N., R. 8 E.:	
Sec. 26, SW¼SE¼, SE¼SE¼ less 2 acres in NE corner, 12 acres in S½ and across south end of SW¼SW¼	90

	Area (acres)
Sec. 27, SW¼SE¼	40
Sec. 35, E½NW¼NW¼, NE¼NW¼ less 5 acres on east side, E½NE¼SE¼	75
Sec. 36, NW¼SW¼, less 3 acres across south side of the big ditch	37
T. 11 N., R. 8 E.:	
Sec. 30, about 3 acres in SW corner of SE¼SW¼	3
Sec. 31, E½NW¼, W½NE¼, NW¼SE¼ less a strip 40 ft. wide on south side; W½SW¼SE¼	219
	681

Neshoba County—Choctaw Meridian

T. 10 N., R. 11 E.:	
Sec. 6, NE¼SE¼	40
T. 10 N., R. 12 E.:	
Sec. 9, SE¼SE¼	40
Sec. 14, NW¼SW¼	40
Sec. 15, N½NW¼, SE¼NW¼, SW¼ less 3 acre Baptist Church site in NE corner; and 3.7 acres in SE corner	280.7
Sec. 20, NE¼NW¼, SW¼NE¼, N½NW¼-SE¼ less 2 acres in NW corner of NE¼-NW¼	98
Sec. 21, NE¼, N½SW¼, NW¼SE¼	280
Sec. 22, NW¼NW¼, NE¼NW¼NE¼, S½-NW¼NE¼, SW¼NE¼	110
Sec. 23, W½SE¼	80

	Area (acres)
T. 11 N., R. 10 E.:	
Sec. 1, all south of Pearl River	108
Sec. 2, all south of Pearl River	142
Sec. 3, all south of Pearl River	101
Sec. 4, all that part of SE¼SE¼ south of Pearl River	35
Sec. 8, all section 8 east of Pearl River	269
Sec. 9, NW¼, S½SW¼, NW¼SW¼, E½-NE¼, SW¼NE¼, S½NW¼NE¼, W½-SE¼	500
Sec. 10, all	640
Sec. 11, N½N½, SW¼NE¼, N½SE¼NE¼, SW¼NW¼, less 2 acres in SW corner and 22 acres in NE corner of NW¼-SW¼	282
Sec. 12, E½, NW¼, S½SW¼	560
Sec. 13, W½, SE¼SE¼, N½S½NE¼, N½-NE¼, W½SE¼	560
Sec. 14, SW¼SW¼, E½NE¼, SW¼NW¼, S½NE¼SW¼, NW¼SW¼, SE¼SW¼, SE¼	420
Sec. 15, SE¼SE¼, NE¼, E½NW¼	280
Sec. 17, NE¼NE¼	40
Sec. 18, SE¼SW¼, S½SW¼, SE¼	60
Sec. 19, E½NW¼	80
Sec. 21, E½NE¼, E½W½NE¼, E½SE¼	200
Sec. 22, N½, SE¼, E½SW¼, SW¼SW¼, 15 acres off south side of NW¼SW¼, N½SW¼, SW¼	635

	Area (acres)
Sec. 23, W½W½, SE¼SW¼	200
Sec. 24, E½, E½W½, E½W½SW¼	520
Sec. 25, SE¼NE¼ less 3 acres in SW corner, 1 acre in NE corner NE¼SE¼	33
Sec. 26, NE¼NW¼, NW¼NE¼ less 10 acres across east side	70
Sec. 27, all land north of Philadelphia & Edinburg Highway in NE¼NW¼, N½NW¼NW¼, 2 acres more or less in NW corner of S½NW¼NW¼, NE¼NE¼, that part of NW¼NE¼ north of highway 16	85
Sec. 28, E½NE¼, W½NW¼ less 3 acres in NW corner & less 8 acres in SW corner and E½NW¼	229
Sec. 36, W½W½SE¼NW¼, S½SW¼NW¼, S½N½SW¼NW¼, W½NE¼, SE¼NE¼, south 18 acres of NE¼NE¼, W½SE¼, SE¼SW¼, S½NE¼SW¼	318
T. 11 N., R. 11 E.:	
Sec. 19, NE¼SE¼, E½NW¼SE¼, W½SW¼, NE¼SW¼, N½SE¼SW¼, W½W½NW¼, E½SW¼NE¼	260
Sec. 30, W½W½NW¼, 1 acre in NW corner NW¼SW¼, SE¼NW¼, E½SW¼NW¼, 2 acres starting in NW corner of E½NW¼SW¼, E½SW¼SW¼, SE¼SW¼, NE¼NW¼, E½NW¼NW¼	223
Sec. 31, S½NW¼	80

	Area (acres)
T. 11 N., R. 13 E.:	
Sec. 1, NW¼NE¼, west 6 acres of NE¼NE¼, north 6 acres of SW¼NE¼	52
Sec. 2, W½NW¼, NW¼SE¼, NE¼SW¼	160
Sec. 3, NE¼	160
T. 12 N., R. 13 E.:	
Sec. 35, S½NE¼, N½SE¼, E½SW¼	240
Sec. 36, SW¼NE¼, W½SW¼, NE¼SW¼, SW¼NW¼, 4 acres in a square in the SE corner of SW¼SE¼	204
	8,719.7

Newton County—Choctaw Meridian

T. 7 N., R. 10 E.:	
Sec. 3, NE¼SW¼, S½SE¼	120
Sec. 4, SW¼SE¼, N½NW¼	120
Sec. 5, NE¼NE¼	40
Sec. 8, NW¼, N½NE¼SW¼ less 2 acres, SE¼SW¼, S½NE¼SW¼ less 2 acres	236
Sec. 9, NE½NE¼	40
Sec. 10, W½NE¼ and 6 acres off north side of NW¼SE¼ and NW¼ less 30 acres off north side of NW¼NW¼, NE¼NE¼	256
Sec. 14, NW¼NW¼, S½NW¼, N½SW¼	200
Sec. 15, SW¼NE¼, NE¼NW¼ less 1 acre in NE corner	79
Sec. 20, E½SW¼, NW¼SW¼, W½SE¼, SE¼SE¼ less 1 acre in NE corner there-	

	Area (acres)
of, S½NE¼, SE¼NW¼, S½NW¼NE¼, S½NE¼NW¼, SE¼NW¼NW¼	409
Sec. 21, N½SE¼	80
Sec. 22, E½NW¼	80

Beginning at a point on the east line of NE¼-SW¼ of Sec. 9, said point being 5 chains north of the SE corner of said NE¼SW¼, and run thence south to the SE corner of SE¼SW¼ of said sec. 9, thence west to the SW corner of SW¼SW¼ of said sec. 9, thence south along the east line of NE¼-NE¼ of sec. 17, 5 chains and 33 links, thence west and parallel with the north line of said NE¼NE¼ of said sec. 17, 5 chains and 33 links, thence north 23 chains to the intersection of Box Creek as same presently runs, thence in an easterly direction along the center of Box Creek as same presently runs to a point where Box Mill Branch joins said Box Mill Creek, as same now runs, thence in an easterly direction along the center of Box Mill Branch as same now runs to the east line of NE¼SE¼ of sec. 8, thence north along the east line of said NE¼SE¼ of said sec. 8, to a point due west of a point in the center of the lake and Philadelphia Public Road as same now runs, said point being 5 chains north of the intersection of the center of Box Mill Branch as same now runs and the center of Lake and Philadelphia Public Road as same now runs, thence east to a point in the center of the Lake and Philadelphia Road as same now

Area (acres)

runs, said point being 5 chains north of the intersection of the center of Box Mill Branch as same now runs and the center of the Lake and Philadelphia Public Road as same now runs, thence south along the center of the Lake and Philadelphia Public Road as same now runs 5 chains to the intersection of the center of said Lake and Philadelphia Public Road with the center of Box Mill Branch as same now runs, thence easterly along the center of Box Mill Branch as same now runs to a point due west of point of beginning, thence east to point of beginning, and being wholly within and a part of SW¼ of sec. 9, NE¼-NE¼ of sec. 17, and SE¼ of sec. 8.

T. 8 N., R. 10 E.:

Sec. 32, SE¼SE¼	
Sec. 33, SW¼ less and except that part lying and being north of Canal.	
Total	1,983

Scott County—Choctaw Meridian

T. 8 N., R. 9 E.:

Sec. 34, S½SE¼NW¼	20

T. 11 N., R. 7 E.:

Sec. 22, NW¼NE¼NE¼	10
Sec. 23, SW½NW¼, NW¼SW¼	80
	110

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-575

SMITH JOHN and HARRY SMITH JOHN, *Appellants,*

v.

STATE OF MISSISSIPPI, *Appellee.*

On Appeal From the Supreme Court of Mississippi

and

No. 77-836

UNITED STATES OF AMERICA, *Petitioner,*

v.

SMITH JOHN and HARRY SMITH JOHN, *Respondents.*

On Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF SMITH JOHN AND HARRY SMITH JOHN

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-575

SMITH JOHN and HARRY SMITH JOHN, *Appellants,*

v.

STATE OF MISSISSIPPI, *Appellee.*

On Appeal From the Supreme Court of Mississippi

---

and

No. 77-836

UNITED STATES OF AMERICA, *Petitioner,*

v.

SMITH JOHN and HARRY SMITH JOHN, *Respondents.*

On Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF SMITH JOHN AND HARRY SMITH JOHN

Harry Smith John died on February 18, 1978, and the cases are therefore moot as to him. The remainder of this brief concerns Smith John alone. Because the

consolidated cases arise from the same events and present closely related issues, this brief is filed for Smith John in both cases. He is referred to herein as defendant, since he was so designated in both trial courts.

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi in No. 77-575 is reported as *John* v. *State,* 347 So.2d 959 (Miss. 1977) and is printed in the Appendix to the Jurisdiction Statement, pages 3a-11a.

The opinion of the United States Court of Appeals in No. 77-836 is reported as *United States* v. *John,* 560 F.2d 1202 (5th Cir. 1977) and is printed in the Appendix to the Petition for Certiorari, pages 1A-33A.

JURISDICTION

This Court is believed to have jurisdiction over No. 77-575 as an appeal pursuant to 28 U.S.C. § 1257(1) and/or § 1257(2). In its order of January 16, 1978, the Court postponed the question of jurisdiction, so it is briefed below under Argument part I. In the alternative, the Court is requested to take jurisdiction over the case on certiorari pursuant to 28 U.S.C. § 1257(3) and § 2103. The judgment of the Supreme Court of Mississippi was entered on May 11, 1977, *rehearing denied,* July 20, 1977. A notice of appeal to this Court was filed with the Supreme Court of Mississippi on October 17, 1977, and the appeal was docketed on October 18, 1977.

The jurisdiction of this Court over No. 77-836 is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on October 11, 1977.

On October 29, 1977, Mr. Justice Powell extended the time for the United States to file a petition for a writ of certiorari to and including December 10, 1977. The United States' petition was filed on December 10, 1977.

LAWS INVOLVED

The following are set out in the Appendix to this brief:

1. The Mississippi Choctaw statute of 1939, Act of June 21, 1939, c.235, 53 Stat. 851;

2. Sections 5, 7, and 19 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 465, 467, 479;

3. The Indian country statute, 18 U.S.C. § 1151;

4. The Indian Major Crimes Act, 18 U.S.C. §§ 1153 and 3242 (pertinent parts);

5. Article 14 of the Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1830).

QUESTIONS PRESENTED

1. Where a state court conviction is sustained by the highest court of a state against the contention that state jurisdiction was barred by federal preemption in Indian country, or by double jeopardy, does this Court have jurisdiction on appeal pursuant to 28 U.S.C. § 1257(1) or (2)?

2. Where Choctaw Indians were charged with felony assault within the Choctaw Indian Reservation in Mississippi, did the federal district court have jurisdiction pursuant to the Indian Major Crimes Act (18 U.S.C. §§ 1153, 3242)?

3. Did the Indian Reorganization Act (25 U.S.C. §§ 461-79) and the Mississippi Choctaw statute of 1939

(53 Stat. 851) authorize the Secretary of the Interior to establish the Choctaw Indian Reservation in Mississippi?

4. Is the Choctaw Indian Reservation Indian country within the meaning of 18 U.S.C. §§ 1151 and 1153?

5. Are the Mississippi Choctaw Indians "terminated" from the coverage of the Major Crimes Act and other federal laws applicable to Indians?

6. Is Major Crimes Act jurisdiction over the Mississippi Choctaw Reservation precluded by the Constitution or by the Treaty of Dancing Rabbit Creek?

7. Was state court criminal jurisdiction precluded by federal preemption over Choctaw Indian country?

8. Was state court criminal jurisdiction subsequent to federal trial precluded by the constitutional prohibition against double jeopardy?

STATEMENT OF THE CASES

A. Federal Court Proceedings Below.

Smith John is full-blooded Mississippi Choctaw Indian, a resident of the Choctaw Indian Reservation in Mississippi, and enrolled at the federal Indian agency at Philadelphia, Mississippi. He was indicted by a federal grand jury in October 1975 for assault with intent to kill in Indian country in violation of 18 U.S.C. §§ 113(a) and 1153.[1] Trial was held before a jury in

[1] In pertinent part, the indictment states:

> The Grand Jury charges:
>
> That SMITH JOHN, an Indian, and HARRY SMITH JOHN, an Indian, on or about August 30, 1975, in Leake County, Mississippi, in the NE 1/4 of Section 34, Township 11 N Range 7 E, in the Jackson Division of the Southern District of Mississippi

the United States District Court for the Southern District of Mississippi on December 7-8, 1975. The jury acquitted defendant of felony assault but convicted him of the lesser included offense of misdemeanor assault as defined by 18 U.S.C. § 113(e). He was sentenced to 90 days imprisonment and $300 fine, and that sentence has now been discharged.

Defendant appealed to the Fifth Circuit Court of Appeals, contending that federal Major Crimes Act jurisdiction does not extend to entering a judgment of conviction and sentence on a misdemeanor.[2] The Fifth Circuit *sua sponte* requested briefing of the issue of Major Crimes Act jurisdiction. Both sides supported jurisdiction, but the court disagreed and issued its opinion now on review.

B. State Court Proceedings Below.

In April 1976 (subsequent to the federal trial), defendant was indicted by the Leake County, Mississippi Grand Jury on the charge of aggravated assault in violation of Miss. Code. Ann. sec. 97-3-7(2) (Supp. 1976). Defendants filed motions to dismiss and supporting documents to show that defendant is an Indian; that the acts alleged occurred in Choctaw Indian country; and that defendant had earlier been tried in the federal

> on and within the Choctaw Indian Reservation and on land within the Indian country within the jurisdiction of the United States of America, did then and there knowingly, willfully, unlawfully and feloniously assault with intent to kill the person of Artis Jenkins, in violation of Sections 1153 and 113(a), Title 18, United States Code.

[2] The issue raised involved interpretation of this Court's decision in Keeble v. United States, 412 U.S. 205 (1973). Since that issue was not decided by the Court of Appeals, it is not argued here.

district court for the same offense. He contended that state jurisdiction was barred by federal preemption over Indian country, and in the alternative that state jurisdiction was unconstitutional double jeopardy. The motions to dismiss were denied, and defendant was tried before a jury on May 7, 1976. Uncontradicted trial evidence showed that defendant is a Choctaw Indian and that the acts charged had occurred within the Choctaw Indian Reservation. Defendant was convicted and sentenced to two years in the Mississippi State Penitentiary. That sentence has not been served, as defendant has remained free on bond.

Defendant appealed to the Supreme Court of Mississippi, which affirmed his conviction. The essential basis of the decision was that federal jurisdiction over the offense was lacking.

C. Background of the Choctaw Reservation.

The basic issue in this case is whether the federal actions establishing the Choctaw Indian Reservation in Mississippi were sufficient to come within the Indian Major Crimes Act, 18 U.S.C. §§ 1153, 3242, and the Indian country statute, 18 U.S.C. § 1151. In deciding this issue, both courts below relied on the history of the Choctaws and of the Reservation. A review of that history is therefore in order.

At the time of European discovery, the Choctaws farmed a domain including most of the present State of Mississippi and adjoining parts of Louisiana and Alabama.[3] Their southernmost lands were acquired by

[3] A. DeRosier, The Removal of the Choctaw Indians (U. Tenn. Press, 1970), pp. 9-11, 29.

the European powers, then the United States negotiated several treaty cessions moving the Choctaw border to the north and east.[4] By the 1820 Treaty of Doak's Stand, 7 Stat. 210, the Choctaws ceded about one-third of their remaining lands in Mississippi in exchange for a large tract (then unknown to either treaty party) in what is now Oklahoma, Texas, and Arkansas.[5] This initiated the policy of trying to remove the Choctaws to the West.

The removal question was a major political issue of the 1820's, and the Choctaws demonstrated considerable skill in resisting it. But they were finally forced to agree to cede their remaining tribal lands in Mississippi and remove to the western lands given them in 1820 in the removal Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1830).[6]

One of the inducements to persuade the Choctaws to agree to the treaty was its clauses permitting individual Choctaws to remain in Mississippi.[7] Articles 15 and 19 and the supplementary articles reserved lands to certain Choctaw chiefs and other leaders, mostly mixed bloods who later assimilated into white society.[8] Article 14 allowed any other "Choctaw head of a family being desirous to remain and become a citizen of the States"

[4] Id., pp. 14-37.

[5] Id., pp. 29, 53-69.

[6] Id., pp. 70-128.

[7] J. Peterson, the Mississippi Band of Choctaw Indians: Their Recent History and Current Social Relations, (U. of Ga. Ph.D. thesis, 1970, available from University Microfilms, Ann Arbor, Mich., No. 71-13, 106, 1971), p. 15.

[8] Id., pp. 25-27; R. Satz, American Indian Policy in the Jacksonian Era (U. of Neb. Press, 1975), p. 86.

to do so and to receive a "reservation" of one section of land plus additional lands for his children. This grant was to include the existing improvements of the claimant. Article 14 also stipulated that claimants "shall not lose the privilege of a Choctaw citizen."

The specific recipients under articles 15 and 19 of the treaty generally prospered thereafter.[9] A majority of the other Choctaws, particularly the leadership and those more educated and acculturated to white society, removed to Indian Territory.[10] But many Choctaws, mostly full bloods and less assimilated, sought to stay and claim lands under article 14.[11] This was an embarrassment to government agents, who had promised their superiors that virtually all Choctaws would remove.[12] So they simply cheated the Choctaws out of the benefits of article 14 by refusing to provide the lands promised. A 1935 Court of Claims decision described these events:

> [Article 14] is seemingly free from ambiguity. The rights conferred are positive ones, defined with a degree of precision apparently incapable of misapprehension, and notwithstanding this fact the large number of Indians who remained in the State were subjected to a series of maladministration[s] of the article by accredited representatives of the United States that in and of itself discloses an inexcusable, cruel, and unjust procedure never excelled, if equaled, in the history of Indian affairs. Not to exceed 143 heads of families, embracing 276 individual Indians, ever received an allotment

[9] Id.

[10] Peterson, *supra* n.7, pp. 25-27; Satz, *supra* n.8, pp. 70-71, 86.

[11] Peterson, *supra* n.7, pp. 16-21, 25-27.

[12] *Id.*, pp. 18-19.

> under article XIV, and at least 1,155 heads of families embracing at least 3,800 individual Indians were by intimidation, false entries, and destroyed documents cheated out of and denied their rights.[13]

Thereafter efforts were made to rectify the article 14 situation, but Mississippi Congressmen insisted that recompense be made only to those who would remove.[14] An 1842 statute allowed Choctaw claimants to be compensated for their article 14 rights in land scrip, but half the scrip was to be withheld until they removed to Indian Territory.[15] This scheme induced several thousand more Choctaws to remove during the years following; again it was the more acculturated Choctaws who removed.[16] By 1860 the Choctaw population remaining in Mississippi was reduced to about 1,000, although they were enough to form a combat battalion in the Confederate Army.[17] The Choctaws who remained in Mississippi after 1833 generally subsisted as squatters on land they did not own. After the Civil War, they became sharecroppers.[18]

[13] Choctaw Nation v. United States, 81 Ct.Cl. 1, 15-16 (1935), *cert. denied*, 296 U.S. 643. Ironically this decision denied recovery to the Choctaws in Oklahoma for money spent on attorneys to represent the interests of Mississippi Choctaws. The article 14 debacle is described in Satz, *supra* n.8, p. 83, as "one of the most flagrant cases of fraud, intimidation, and speculation ever recorded in American history." *See also*, Peterson, *supra* n.7, pp. 16-22, describing the government agent in charge of article 14 administration.

[14] Satz, *supra* n.8, pp. 83-87; Peterson, *supra* n.7, pp. 23-24.

[15] Act of Aug. 23, 1842, c.187, 5 Stat. 513.

[16] Peterson, *supra* n.7, pp. 25-27.

[17] Id., pp. 24, 50-51.

[18] Peterson, *supra* n.7, pp. 42-50, 54-58.

The Choctaw Nation in Indian Territory negotiated several subsequent treaties with the United States. One of some relevance to the Mississippi Choctaws was the Treaty of June 22, 1855, which provided that "all their subsisting treaty stipulations be embodied in one comprehensive instrument" (preamble) and superseded "all former treaties between the United States and the Choctaws . . ." (article 21).[19] However, the United States later recognized rights under article 14 of the Treaty of Dancing Rabbit Creek.[20] The Treaty of April 28, 1866, 14 Stat. 769, art. 13, required notice to all absent Choctaws of any plan to allot the tribe's lands in Indian Territory, to allow those persons to be able to claim rights in the lands.

Another Choctaw removal was generated by the scheme to allot the Indian Territory lands in preparation for Oklahoma Statehood. Acts of Congress and decisions of the Dawes Commission between 1897-1906 qualified Mississippi Choctaws to receive allotments from the Choctaw lands in the Indian Territory if they would remove.[21] Many Choctaws chose to remove and claim allotments, again generally the more acculturated.[22]

Then began the events leading to reestablishment of federal supervision over the Choctaws in Mississippi.

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[19] 11 Stat. 611, 615. Article 21 includes the phrase "inconsistent with this agreement", following a reference to treaties other than those referred to in the language quoted in the text. The phrase apparently does not refer to the quoted language, although this is not certain.

[20] *See* n.21, *infra* and text. The court in Choctaw Nation v. United States, 81 Ct.Cl. 1, 6 (1935), held that article 14 survived the 1855 treaty.

[21] Act of June 7, 1897, c. 3, 30 Stat. 62, 83; Act of June 28, 1898, c. 517, § 21, 30 Stat. 495, 503; Act of May 31, 1900, c. 598, 31 Stat. 221, 236; Act of July 1, 1902, c. 1362, §§ 41-44, 32 Stat. 641, 651-52; Act of March 3, 1903, c. 994, 32 Stat. 982, 997; Act of June 21, 1906, c. 3504, 34 Stat. 325, 341.

[22] Peterson, *supra* n.7, pp. 90-108.

The Bureau of Indian Affairs sent an agent to report on their condition in 1908.[23] In 1916 Congress appropriated funds "to investigate the condition of the Indians living in Mississippi . . . as to their need for additional land and school facilities. . . ." [24] The resulting reports on the destitute condition of the Mississippi Choctaws led to a 1918 appropriation "for relief of distress among the fullblood Choctaw Indians of Mississippi," allocating funds for an agent, schools, land purchases, and other assistance.[25] Similar appropriations were made every year thereafter through 1931 (fiscal 1932), all for fullblood Mississippi Choctaws.[26]

The Choctaws who had remained were concentrated in east central Mississippi, the heart of their ancient homeland.[27] The federal land purchases made with funds appropriated between 1918-1931 were at seven locations where Choctaws were already concentrated, the villages of Bogue Chitto, Bogue Homo, Conehatta, Pearl River, Red Water, Standing Pine, and Tucker.[28] The purchases were of farmland for individ-

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[23] *Id.*, p. 110.

[24] Act of May 18, 1916, c. 125, § 10, 39 Stat. 123, 138.

[25] Act of May 25, 1918, c. 86, § 9, 40 Stat. 561, 573. *See also*, Annual Report of the Commissioner of Indian Affairs for 1918 (GPO 1918), 83-85.

[26] 41 Stat. 15 (1919); 41 Stat. 420 (1920); 41 Stat. 1236 (1921); 42 Stat. 570 (1922); 42 Stat. 1191 (1923); 43 Stat. 409 (1924); 43 Stat. 1149 (1925); 44 Stat. 461 (1926); 44 Stat. 941 (1927); 45 Stat. 206 (1928); 45 Stat. 1568-69 (1929); 46 Stat. 286 (1930); 46 Stat. 1121 (1931). This list omits a few miscellaneous and supplemental appropriations.

[27] Peterson, *supra* n.7, p. 1-3, 6-8. This area is the location of the most important Choctaw cultural and religious site, the mound of Nanih Waiya. DeRosier, *supra* n.2, pp. 6-7.

[28] These seven villages comprise the Reservation today. Peterson, *supra* n.7, Appendix 2.

ual Choctaws, who were expected to reimburse the Government. But this proved difficult, and during the hard times of the 1930's all defaulted.[29]

In 1934 Congress passed the Indian Reorganization Act (25 U.S.C. §§ 461-79). Section 18 of the Act (25 U.S.C. § 478) required its submission to Indian groups for their determination whether to accept or reject the Act. On March 30, 1935, the Act was voted on by the Mississippi Choctaws, and they accepted it.[30] Thereafter, land purchases were made in common for the Mississippi Choctaws of one-half or more Indian blood pursuant to Sections 5 and 19 of the I.R.A.[31]

In 1939 the Secretary of the Interior asked Congress to take title to the lands acquired under the appropriations of 1918-1931 in trust for the Mississippi Choctaws of one-half or more Indian blood, and Congress did so by the Act of June 21, 1939.[32] One purpose of this statute was to permit the Choctaws to form a tribal government pursuant to Section 16 of the I.R.A. (25 U.S.C. § 476).[33] In 1944, the Secretary of the Interior issued and published a proclamation pursuant to Section 7 of the I.R.A. (25 U.S.C. § 467) to establish the Choctaw lands as an Indian reservation.[34] On May 22,

[29] Peterson, *supra* n.7, pp. 115-23.

[30] T. Haas, Ten Years of Tribal Government under the I.R.A. (U.S. Indian Svc. 1947) p. 17.

[31] Peterson, *supra* n.7, p. 124.

[32] C. 235, 53 Stat. 851, printed in the Appendix to this brief.

[33] H. Rept. No. 194, 76th Cong., 1st Sess. (1939), discussed *infra* at pp. 30-31.

[34] 9 Fed. Reg. 14907 (1944); *see also*, the opinion of the federal court below, Pet. for Cert. pp. 25A-33A.

1945, the Secretary approved a Constitution for the Mississippi Band of Choctaw Indians pursuant to Section 16 of the I.R.A. (25 U.S.C. § 476).[35]

D. Status of the Choctaws in Mississippi.

The foregoing description does not fully address the legal and social situation of the Choctaws in Mississippi. Because some aspects of this situation were relied on by the courts below, a few additional references are required.[36]

One device used to induce the Choctaws to agree to the 1830 removal treaty was enactments of the Mississippi Legislature in 1829 and 1830 purporting to extend state laws over the Choctaws. The Miss. Act of Feb. 4, 1829, declared the Choctaws to be state citizens and subject to state laws, and the Act of Jan. 19, 1830, purported to abolish tribal governments, eliminate all rights under tribal law, and punish anyone holding tribal office.[37] The revised Mississippi Constitution of 1833 provided that the "legislature shall have power to admit to all the rights and privileges of free white citizens of this State all such . . . Indians as shall choose to remain in this State, upon such terms as the legislature may from time to time deem proper."[38]

The statutes of 1829 and 1830 appeared in an 1848 codification but were repealed by omission from the

[35] T. Haas, *supra* n.30, p. 22.

[36] See notes 83-84 and 107 *infra* and text.

[37] Peterson, *supra* n.7, p. 13. These statutes were likely invalid under the rule of this Court's decision in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[38] Satz, *supra* n.8, pp. 86-87.

1857 Mississippi Code Revised and of all subsequent codes.[39] The 1890 Mississippi Constitution, art. 12, § 241, guaranteed the vote to all adult inhabitants who paid the poll tax except "idiots, insane persons and Indians not taxed." The reference to Indians was deleted by an amendment in 1972.[40]

Whatever the *de jure* situation under these laws, most Mississippi Choctaw Indians were in fact denied civil and political rights of citizens until the 1960's and 1970's.[41]

As already noted the removal policy tended to induce the more assimilated and acculturated Choctaws to migrate to Indian Territory (except for those few claimants under articles 15 and 19). Most Choctaws who remained in east central Mississippi were fullbloods, and the appropriations of 1918-1931 were for fullbloods only. The I.R.A. definitions of halfblood or more has been used since 1935, but the Choctaws remain one of the most traditional and separate Indian communities in the United States. The great majority speak Choctaw as their first language,[42] and virtually all children attend federal Indian schools.[43] Recent economic oppor-

[39] *See* Hutchinson's Code of Miss., ch.5, art. 13-14 at 136 (1848), omitted from the Miss.C.Rev. of 1857. Ch. 1, art. 3 of the latter repealed omitted provisions. *See also* the Act of Adoption, § 15, of the 1930 Miss.C.Ann.

[40] See Tubby v. State, 327 So.2d 272, 287 (Miss. 1976).

[41] Winton v. Amos, 255 U.S. 373, 379 (1921) (". . . they were denied all social and political privileges . . ."); Peterson, *supra* n.7, pp. 219-47; Satz, supra n.8, pp. 86-87.

[42] Peterson, *supra* n.7, p. 8; B. Spencer, *et al.*, Choctaw Manpower and Demographic Survey, 1974 (USOE grant to Miss. Band of Choctaw Indians 1975) p. 16.

[43] Peterson, *supra* n.7, pp. 248-74.

tunities may in time alter the situation, but there can be no doubt that the Mississippi Choctaws remain a "people distinct from others."[44]

SUMMARY OF ARGUMENT

No. 77-575 meets the statutory requisites for an appeal under either 28 U.S.C. § 1257(2) or (1). This Court has reviewed many cases where federally-protected Indian rights were denied by state courts by writ of error and by the modern appeal procedure.

Federal jurisdiction to prosecute defendant depended on applicability of the Indian Major Crimes Act (18 U.S.C. §§ 1153, 3242) and the Indian country statute (18 U.S.C. § 1151). The intent of Congress in enacting Section 1151, as illustrated by numerous decisions of this Court, was to define Indian country as any land or area lawfully reserved or set aside for the residence of Indians under federal supervision. The decisions below seek to carve out a unique exception from these statutes for the Mississippi Choctaws. However, the plain language of the statutes is inclusive of all states and all Indians, and this Court has consistently rejected prior attempts to except particular Indian lands from the statutes. Congress has recognized this rule by enacting specific exceptions.

Federal supervision over the Mississippi Choctaws was reestablished in stages between 1918-1945. The Interior Department submitted the Indian Reorganization Act to the Mississippi Choctaws for their approval and purchased trust land for them under the Act. In 1939 Congress passed a specific statute (53 Stat. 851) placing all Choctaw lands in the same trust status. The

[44] The Kansas Indians, 72 U.S. (5 Wall.) 737, 755 (1867).

Act was also intended to facilitate the organization of a tribal government by the Choctaws under Section 16 of the I.R.A. In 1944 the Secretary proclaimed the Choctaw lands to be an Indian reservation pursuant to the authority of Section 7 of the I.R.A.

In 1944 the Major Crimes Act applied within Indian reservations, so the Choctaw Reservation came within its terms at that time. Under the 1948 codification of Indian Country, 18 U.S.C. § 1151, the Choctaw Reservation is Indian country under Section 1151(a) and Section 1151(b).

The opinions below purport to avoid this conclusion by construing the Indian Reorganization Act not to apply to the Mississippi Choctaws. However, that view does violence to the plain language of the Act; is inconsistent with the legislative history of the Act and of the 1939 Mississippi Choctaw statute; and is inconsistent with the Interior Department's interpretation of the Act.

The courts below erroneously viewed the establishment of the Choctaw Reservation as inconsistent with the Treaty of Dancing Rabbit Creek and with citizenship of the Choctaws. The state court in an earlier decision imposed a requirement of state consent under the arsenals and dockyards clause of the Constitution, but this Court has previously rejected such a requirement in like circumstances.

The federal court below erroneously interpreted 18 U.S.C. § 1151(a) to preclude federal jurisdiction over the Choctaw Reservation because it consists of seven non-contiguous villages. This view is contrary to decisions of this Court interpreting that statute and the Major Crimes Act.

The federal court below ruled that the Mississippi Choctaws are not Indians, because they were purportedly terminated by the Treaty of Dancing Rabbit Creek. This is inconsistent with the terms of the treaty and with subsequent federal statutes and administrative treatment.

The state court below in a prior case held that Mississippi acquired jurisdiction over the Choctaws pursuant to the federal consent statute, Public Law 280, in 1972. However, that state action was insufficient to comply with that law, and the Choctaws did not consent as required by 25 U.S.C. § 1326.

This Court has consistently held that Major Crimes Act jurisdiction is exclusive of state court jurisdiction. No reason exists to apply a different rule to the Mississippi Choctaws. Concurrent state/federal jurisdiction would be troublesome and should be rejected.

In the alternative, the double jeopardy clause bars the state's reprosecution of defendant.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER NO. 77-575 AS AN APPEAL.

In its order of January 16, 1978, the Court postponed the question of jurisdiction in No. 77-575 to the hearing of the case on the merits. 46 U.S.L.W. 3453. In the discussion following, defendant supports jurisdiction over this case as an appeal.

28 U.S.C. § 1257(2) confers jurisdiction over appeals from the highest court of a state "where [there] is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the de-

cision is in favor of its validity." In the present case, Mississippi prosecuted defendant pursuant to Miss.C. Ann. § 97-3-7(2), defining and punishing aggravated assault.[45] By motion to dismiss and on appeal, defendant contended that state jurisdiction to apply this statute to him is preempted by the federal laws establishing the Choctaw Indian Reservation, defining the Reservation as Indian country, and providing for the punishment in Indian country of offenses by Indians. (These contentions are of course the subject of the remainder of this brief.) Defendant thus drew into question the validity of the Mississippi statute as applied to him on the ground that it is repugnant to the Supremacy Clause of the Constitution, art. VI, § 2, and the court below ruled in favor of the statute's validity.

The Court has held that Section 1257(2) applies to cases where the issue is the validity of a state statute as applied, as well as where the issue is validity of the statute on its face.[46] On the other hand an appeal does not lie where the claim is that there is an erroneous exercise of authority under a valid statute,[47] or that an otherwise valid statute is being applied discriminatorily in viola-

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[45] The issue is not actually confined to this statute and applies as well to the general state laws conferring jurisdiction on the trial court, authorizing arrests, authorizing indictments, etc. However, the particular assault statute is the focus of the issue, and no purpose would be served in detailing the other state laws that were applied to defendants.

[46] Bantam Books v. Sullivan, 372 U.S. 58, 61 n.3 (1963); Fiske v. Kansas, 274 U.S. 380, 385 (1927); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).

[47] Philadelphia & Reading Coal & Iron Co. v. Gilbert, 245 U.S. 162 (1917).

tion of the Constitution.[48] While the distinction between these situations may be difficult at times, the instant case is clearly within Section 1257(2). Defendant contends that Mississippi's criminal laws are invalid as applied to Indians in Choctaw Indian Country under the Supremacy Clause—a categorical claim not dependent on the particular form of application of those laws in this case.

Historically, this Court reviewed cases where federal rights accorded Indians were in conflict with state law, and a state court had ruled in favor of the state law position, by writ of error, the ancestor of today's appeal procedure.[49] Under the modern appeal procedure the Court has accepted jurisdiction on appeal in other such cases.[50] Like cases have also been reviewed on certiorari, but this was apparently based solely on the election of petitioning counsel.[51]

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[48] Charleston Fed'l Savings & Loan Assn v. Alderson, 324 U.S. 182 (1945).

[49] Sizemore v. Brady, 235 U.S. 441 (1914); Choate v. Trapp, 224 U.S. 665 (1912); Tiger v. Western Investment Co., 221 U.S. 286 (1911); McKay v. Kalyton, 204 U.S. 458 (1907); Spalding v. Chandler, 160 U.S. 394 (1896); The New York Indians, 72 U.S. (5 Wall.) 761 (1867); The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867) (3 cases); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); *see also* New York ex rel. Cutler v. Dibble, 62 U.S. (21 How.) 366 (1859); Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1857).

[50] Antoine v. Washington, 420 U.S. 194 (1975); Tonasket v. Washington, 411 U.S. 451 (1973); McClanahan v. Arizona Tax Com'n, 411 U.S. 164 (1973); Warren Trading Post Co. v. Arizona Tax Com'n, 380 U.S. 685 (1965); Tulee v. Washington, 315 U.S. 681 (1942).

[51] *E.g.*, Williams v. Lee, 358 U.S. 217 (1959).

The other requisites of jurisdiction on appeal are clearly met. There is a final judgment of the highest court of the state; the case presents federal questions which were decided by that court; and as the discussion in the remainder of this brief makes clear, the questions are substantial. For these reasons, jurisdiction over No. 77-575 is properly grounded on 28 U.S.C. § 1257(2).

There is also jurisdiction pursuant to 28 U.S.C. § 1257(1), on the ground that the court below held several federal statutes to be invalid as applied. The federal laws in question are (1) the special Mississippi Choctaw statute of 1939, 53 Stat. 851, *supra,* and the Indian Reorganization Act, *supra,* particularly sections 7 and 19, 25 U.S.C. §§ 467 and 479; (2) the Major Crimes Act, 18 U.S.C. §§ 1153 and 3242; the Indian country statute, 18 U.S.C. § 1151; and the particular federal statute punishing assault, 18 U.S.C. § 113.

The court below found these statutes to be unconstitutional in three respects. The opinion views the statutes as in conflict with the Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1830), and rules that the treaty "cannot be altered by an Act of Congress, Congress cannot obliterate the jurisdiction of Mississippi over its citizens." J.S. page 6a. Although this statement is made in one sentence, it contains two concepts: that a treaty has a higher status in federal law than a statute, and that Congress lacked authority to preempt state jurisdiction over the Choctaws because they were state citizens. The statutes' third infirmity found by the court below is based on the court's express reliance on its prior decision in *Tubby* v. *State,*

327 So.2d 272 (Miss. 1976), involving identical issues.[52] In that opinion the court below ruled that state consent is constitutionally required for federal jurisdiction over the Mississippi Choctaws, relying on the arsenals and dockyards clause of the Constitution, art. I, § 8, cl.17. 327 So.2d at 281-84.

Thus on three related grounds, the court below ruled that Congress had no power to preempt criminal jurisdiction over the Mississippi Choctaws, so that the federal laws establishing the present Choctaw Reservation and asserting criminal jurisdiction over Choctaw Indian Country are invalid as applied. Jurisdiction thus lies on appeal pursuant to 28 U.S.C. § 1257(1)

II. THE FEDERAL DISTRICT COURT HAD MAJOR CRIMES ACT JURISDICTION

A. General Law Regarding the Major Crimes Act.

Federal jurisdiction to prosecute defendant depended on the applicability of the Indian Major Crimes Act, 18 U.S.C. §§ 1153 and 3242, and of the related code section, 18 U.S.C. § 1151 (Indian country), which defines the territorial applicability of the Major Crimes Act.[53] The general principles governing application of these sections are thus the basic law for the issues now on review.

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[52] The *Tubby* ruling on these issues was technically *dictum,* because the court reversed Mr. Tubby's conviction on other grounds.

[53] 18 U.S.C. § 1151, and pertinent parts of 18 U.S.C. §§ 1153 and 3242, are printed in the Appendix to this brief. The latter sections were amended after the events here at issue, and the Appendix includes the sections in force at that time (August 30, 1975).

The Major Crimes Act was first enacted in 1885 to provide for federal prosecution of Indians accused of seven felony-grade offenses "within the boundaries of any State of the United States, and within the limits of any Indian reservation . . ." and in the territories.[54] Subsequent amendments and reenactments enlarged the list of offenses to fourteen,[55] and the area of coverage was changed in 1948 to Indian country as defined by 18 U.S.C. § 1151.

The first interpretation of the Major Crimes Act by this Court was made in *United States* v. *Kagama,* 118 U.S. 375 (1886). Two Indians were convicted of murder occurring within the Hoopa Indian Reservation in California, a reservation established by executive orders pursuant to statutory authority, all made after California had become a state.[56] Their counsel argued that the state courts had exclusive jurisdiction over

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[54] Act of Mar. 3, 1885, c.341, § 9, 23 Stat. 362, 385. This statute is the ancestor of both 18 U.S.C. § 1153 and § 3242.

[55] In chronological order, these were:

Act of Jan. 15, 1897, c.29, § 5, 29 Stat. 487;
Act of Mar. 4, 1909, c.321, § 328, 35 Stat. 1088, 1151;
Act of June 30, 1926, c.712, 44 Stat. 777, 18 U.S.C. § 548 (codified but terms unchanged);
Act of June 28, 1932, c.285, 47 Stat. 336-37;
Act of June 25, 1948, c.645, 62 Stat. 683, 758, 827, 18 U.S.C. §§ 1153, 3242;
Act of May 24, 1949, c.139, 63 Stat. 89, 94, 96;
Act of Nov. 2, 1966, Pub.L. 89-707, 80 Stat. 1100-01;
Act of Apr. 11, 1968, Pub.L. 90-284, § 501, 82 Stat. 73, 80;
Act of May 29, 1976, Pub.L. 94-297, 90 Stat. 585-86.

[56] The establishment and extension of the Hoopa Reservation are detailed in Mattz v. Arnett, 412 U.S. 481 (1973); Short v. United States, 486 F.2d 561 (Ct.Cl. 1973), *cert. denied,* 416 U.S. 961, reh. den. 417 U.S. 959; and Donnelly v. United States, 228 U.S. 243 (1913). The latter case is discussed further *infra.*

the offense, but this Court rejected the contention and affirmed the convictions. The *Kagama* ruling has never been departed from in subsequent decisions of this Court.[57]

Prior to 1948 the term "Indian country" had a somewhat separate legal history from the Major Crimes Act.[58] Indian country was the territory within which federal statutes applied defining liquor offenses,[59] inter-racial crimes,[60] trade with Indians,[61] and certain other matters.[62] For a long period there was no comprehensive statutory definition of Indian country,[63] and the federal courts thus undertook to define the term as a matter of decisional law. In *Donnelly* v. *United States,* 228 U.S. 243 (1913), the Court re-

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[57] The Court has frequently cited *Kagama* favorably, most recently in United States v. Antelope, 430 U.S. 641, 648 (1977). *See also* Antoine v. Washington, 420 U.S. 194, 199-200 (1975); United States v. Mazurie, 419 U.S. 544, 557 (1975); Keeble v. United States, 412 U.S. 205, 209 n.9 (1973); McClanahan v. Arizona Tax Com'n, 411 U.S. 164, 169 (1973); Williams v. Lee, 358 U.S. 217, 219 n.4 (1959).

[58] *See, e.g.,* United States v. Celestine, 215 U.S. 278, 285 (1909).

[59] *See* Rev. Stat. 2139, *as amended,* 18 U.S.C. § 1154; Rev. Stat. 2141, now 25 U.S.C. § 251; Act of June 30, 1919, c.4, § 1, 41 Stat. 4, now 18 U.S.C. § 1156.

[60] *See* Rev. Stat. 2145-46, *as amended,* 18 U.S.C. § 1152.

[61] *See* Rev. Stat. 2133, *as amended,* 25 U.S.C. § 264.

[62] *See generally* Rev. Stat. Title XXVIII ch. 4.

[63] From the effective date of the Revised Statutes in 1874, there was no statutory definition of any kind until 1897. The Act of Jan. 30, 1897, c.109, § 1, 29 Stat. 506, amending the basic liquor prohibition statute, specified that Indian allotments were included in the term Indian country. However, there was no general definition until the 1948 enactment of 18 U.S.C. § 1151.

viewed the federal conviction of a white man for murder of an Indian within the Hoopa Reservation (the same locale as the *Kagama* case). After a thorough review of the issue, the Court decided that the Reservation was Indian country, and the conviction was affirmed.[64] Later the same year the Court in *United States* v. *Sandoval,* 231 U.S. 28 (1913), held that the Santa Clara Pueblo in New Mexico was Indian country despite the distinctive history and form of land tenure of the Pueblos.[65] Shortly thereafter in *United States* v. *Pelican,* 232 U.S. 442 (1914), the Court held that a single Indian trust allotment was Indian country.[66] In *United States* v. *McGowan,* 302 U.S. 535 (1938), the issue was whether land purchased by the United States in 1916 and 1926 for residence of needy Indians in Nevada and commonly termed an "Indian colony" was Indian country, and the Court ruled that it was.

When Congress codified the term Indian country in 1948 as 18 U.S.C. § 1151, it directly relied on those decisions of the Court. Section 1151(a), Indian reservations, comes from both the prior language of the Major Crimes Act and from the Court's decision in *Donnelly* v. *United States, supra. See* Reviser's Note, 18 U.S.C.A. § 1151. Section 1151(c), Indian allotments, codified the Court's decision in *United States* v. *Peli-*

[64] The Court held or assumed other Indian reservations to be Indian country in Pronovost v. United States, 232 U.S. 487 (1914), and Williams v. United States, 327 U.S. 711 (1946).

[65] *Sandoval* was followed in United States v. Chavez, 290 U.S. 357 (1933), involving the Isleta Pueblo.

[66] *Pelican* involved a trust allotment. In United States v. Ramsey, 271 U.S. 467 (1926), the Court held that a restricted allotment was also Indian country.

can, supra. Id. Section 1151(b), dependent Indian communities, codified a term the Court had used in the opinions in *United States* v. *Sandoval* and *United States* v. *McGowan, supra,* to refer to Indians living on trust or restricted lands described by some term other than "reservation" or allotment." *Id.* Furthermore Section 1151(b) expressly applies everywhere "within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state." [67]

The intent of Congres in enacting Section 1151, as illustrated by the prior decisions of this Court, was thus to define Indian country as any land or area lawfully reserved or set aside for the residence of Indians under federal supervision. Distinctions according to whether the land was set aside by treaty, statute, executive order, purchase or otherwise, were disapproved, as were distinctions based on the common label applied to the lands [68] or on whether the reservations were created before or after statehood.

[67] The quoted language was codified almost *verbatim* out of the Court's opinion in United States v. Sandoval, *supra,* 231 U.S. at 46, quoted with approval in United States v. McGowan, *supra,* 302 U.S. at 538.

[68] *See* in particular the discussion in United States v. McGowan, *supra,* 302 U.S. at 538-39. In other contexts, the Court has reached similar conclusions. For example in Minnesota v. Hitchcock, 185 U.S. 373, 389-90 (1902), the Court stated:

> Now, in order to create a reservation, it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes.

See also Spalding v. Chandler, 160 U.S. 394, 403-04 (1896); Arizona v. Calif., 373 U.S. 546, 597-98 (1963).

Neither opinion below evidences any disagreement with the general law regarding the Major Crimes Act or Indian country. Instead both opinions seek to carve out a unique exception for the Mississippi Choctaws. However, it is apparent that such a view finds support in neither the terms of the statutes nor the prior decisions of this Court. The plain language of both the original Major Crimes Act and of the 1948 Code provisions now in force is inclusive of all states and of all Indians. This Court has consistently rejected prior attempts to except particular Indian lands from the reach of the statutes.[69] Also, Congress has enacted specific exceptions to the basic statutes, manifestly on the assumption that absent such exceptions the statutes would apply.[70]

B. The Choctaw Reservation Is Indian Country.

Major Crimes Act jurisdiction applies only to events in Indian country, and the principal basis for both decisions below is their conclusion that the Choctaw Reservation is not Indian country or that Congress had no authority to establish Indian country in Mississippi. These conclusions are incorrect.

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[69] United States v. McGowan, *supra;* United States v. Chavez, *supra;* United States v. Ramsey, *supra;* Pronovost v. United States, *supra;* United States v. Pelican, *supra;* United States v. Sandoval, *supra;* Donnelly v. United States, *supra;* United States v. Celestine, *supra.* Of course the Court has recognized that the Indian country status of lands can be lawfully terminated by Congress, *e.g.*, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975).

[70] *See* 25 U.S.C. § 232 (New York State reservations) and Public Law 280, 18 U.S.C. § 1162, *as amended*, 25 U.S.C. § 1321. 18 U.S.C. § 1162(c) makes specific reference to the Major Crimes Act, 18 U.S.C. § 1153.

The reestablishment of federal supervision over the affairs of the Mississippi Choctaws has proceeded in several stages. The policy of the Treaty of Dancing Rabbit Creek favoring removal of the Choctaws to Indian Territory remained federal policy into this Century. As recited above, the decisions of the Dawes Commission and Congress induced the removal of a number of Mississippi Choctaws to Indian Territory as late of 1906. At that time the federal policy was not to assist the Choctaws in Mississippi unless they would remove. But the Government had a change of heart, and in 1918 Congress appropriated funds to establish an Indian Agency at Philadelphia, Mississippi, and to assist the Choctaws to buy land of their own. In 1935, the Bureau of Indian Affairs submitted the Indian Reorganization Act to the Mississippi Choctaws for approval or rejection,[71] recognizing them as a separate group from the Oklahoma Choctaws. They voted to accept the Act, and additional land purchases were made for them pursuant to Section 5, 25 U.S.C. § 465.

In 1939 Congress specifically acted to place title to the lands held for the Mississippi Choctaws in trust for the benefit of the Mississippi Choctaws of one-half or more Indian blood. 53 Stat. 851, *supra.* This statute was clearly tied to the Indian Reorganization Act in several respects. The one-half blood definition is taken from Section 19 (25 U.S.C. § 479). The legislative history clearly indicates that Congress intended by the statute to qualify the Choctaws for self-government under the I.R.A. See discussion below at pages 30-31. In 1944 the Secretary of the Interior proclaimed

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[71] *See* n.30 *supra.*

the Choctaw lands to be an Indian reservation pursuant to 25 U.S.C. § 467. 9 Fed. Reg. 14907 (1944), Pet. pp. 23A-33A."

These events were clearly sufficient to include the Choctaw Reservation within the Major Crimes Act jurisdiction. In 1944 that jurisdiction applied only within Indian reservations, as noted above, although this Court's definition of "Indian country" was broader. In 1948 Congress defined Indian country and utilized the term in the Major Crimes Act. Thus the Choctaw Reservation came within the Major Crimes Act as of 1944, when it was proclaimed an Indian reservation by the Secretary. That conclusion was strengthened when Congress codified Indian country in 1948, essentially adopting the views of this Court in *United States* v. *McGowan,* 302 U.S. 535 (1938). Under *McGowan,* the 1939 Choctaw statute was sufficient to constitute the Choctaw lands as a "dependent Indian community" and thus Indian country. For this reason the present Choctaw Reservation is Indian country under 18 U.S.C. § 1151(a) (Indian reservations) and 18 U.S.C. § 1151(b) (dependent Indian communities).

Both decisions below reject the reasoning just stated on two grounds. First, they construe the Indian Reorganization Act as inapplicable, thus invalidating the 1944 proclamation of the Secretary. Second, they find the process to be beyond the constitutional authority of Congress for various reasons. The federal decision

[12] Current Government publications list the Choctaw Reservation as a federal Indian reservation, *e.g.,* U.S. Dept. of Commerce, Federal and State Indian Reservations and Indian Trust Areas (GPO 1974) p. 265.

adds a third ground: that the 1948 act defining Indian country (18 U.S.C. § 1151) excluded the Choctaw Reservation irrespective of other considerations. Each of these contentions should be considered separately.

(1) The Indian Reorganization Act Applies to the Mississippi Choctaws.

Both opinions below construe the I.R.A. to apply only to recognized tribes living on reservations in existence at the time the Act was passed. J.S. pp. 7a-8a; Pet. pp. 19A-20A. This construction is incorrect for a number of reasons.

First, it does violence to the plain language of the Act. Section 19 (25 U.S.C. § 479) defines Indians as members of tribes, their descendants living on reservations in 1934, "and shall further include all other persons of one-half or more Indian blood." The construction below would confine the Act solely to tribal members and descendants and thus nullify the quoted language. For these and other reasons, the District of Columbia Circuit reached a contrary result in *Maynor* v. *Morton,* 510 F.2d 1254 (D.C. Cir. 1975).

The interpretation of the Act below would nullify Section 7 of the I.R.A. (25 U.S.C. § 467), authorizing the Secretary to "proclaim new Indian reservations." If the I.R.A. is fully confined to reservations existing in 1934, this authority is meaningless." The point becomes clearer when Section 7 is read together with Section 5 (25 U.S.C. § 465). The latter author-

[13] 25 U.S.C. Section 473 provides that portions of the I.R.A. (including section 7) do not apply to certain tribes in Oklahoma, including the Choctaws. However, the exception is confined to that state. See, 78 Cong. Rec. 11126 (1934). Also, the specifying of some exceptions implies an intent to be otherwise inclusive.

izes acquisition of lands "within or without existing reservations" in trust for either Indian tribes or individual Indians. The process obviously contemplated purchases in trust pursuant to Section 5 followed in some cases by proclamations under Section 7, and this is in part what occurred regarding the Choctaw Reservation. However, Congress also interposed the special 1939 Act in order to bring the Choctaw lands acquired between 1918-1931 within the I.R.A. as well, a purpose made clear by the legislative history of that act (see below).

That Congress did not exclude the Mississippi Choctaws from the benefits of the I.R.A. is also clear from the legislative history of both the I.R.A. and of the 1939 Act. While there can be little if any ambiguity in the terms of the relevant sections of the I.R.A. the legislative history reinforces the obvious. In the House bill, Section 7 would have permitted only additions to existing reservations."[74] But the conference committee adopted the Senate's version, which is the present law."[75] It authorized the Secretary to "proclaim new Indian reservations" as well as to add lands to existing reservations. The history also makes clear that a major purpose of Section 5 was to acquire land for "landless Indians."[76]

The 1939 Choctaw statute was passed at the request of the Interior Department, and its purposes were stated in the House Report:

> *Specific effect of the bill if enacted*—It will place all those lands purchased under the authority of the

[74] H.Rept. No. 1804, 73d Cong., 2d Sess. (1934) p. 3.

[75] H.Rept. No. 2049 (Conference Report), 73d Cong., 2d Sess. (1934), pp. 3, 7.

[76] H.Rept. No. 1804, 73d Cong., 2d Sess. (1934), p. 7; S.Rept. No. 1080, 73d Cong., 2d Sess. (1934), p. 2.

> various resale acts in the same status as the lands being purchased under the authority of section 5 of the Indian Reorganization Act for the Mississippi Choctaws.
>
> *Advantages*—It will avoid many administrative problems which will arise otherwise; will insure a more productive use of the lands; and will facilitate matters greatly if the Indians should choose to organize under section 16 of the Indian Reorganization Act, and take over administration of their lands."

Thus Congress in 1939, only five years after the I.R.A. expressly recognized that the Mississippi Choctaws are within that Act. In particular Congress recognized that the Mississippi Choctaws are eligible for reservation self-government pursuant to Section 16 (25 U.S.C. § 476).

A further problem with the statutory construction of the decisions below is that it runs contrary to the interpretation of the relevant laws by the Interior Department and Bureau of Indian Affairs, to whose administration these statutes are committed. This Court has frequently held that administrative interpretations in such circumstances are entitled to deference. *E.g., Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 660 (1976). Soon after the I.R.A. was enacted, the Bureau of Indian Affairs conducted elections among the Indians to whom it applied. The elections were mandated by Section 18 (25 U.S.C. § 478), requiring that the Indians vote on whether to accept or reject the statute. In 1935 an election was held among the Mississippi Choctaws, and they voted to accept the Act."[78] This

[77] H.Rept. No. 194, 76th Cong., 1st Sess. (1939), p. 3.

[78] *See* n.30, *supra*.

was a recognition by the B.I.A. of the Mississippi Choctaws as an Indian band to whom the Act applied.

The administrative interpretation of the I.R.A. was temporarily placed in doubt between May 1936 and January 1938 by the litigation resulting in this Court's decision in *United States* v. *McGowan,* 302 U.S. 535 (Jan. 1938). Both lower courts in that case had held that Indian country could not be reestablished by federal purchase of lands for Indians."[9] The Interior Department was aware of these decisions, *e.g.,* 56 I.D. 137, 143 (1937). But this Court's decision in *McGowan* reversing the lower courts removed those doubts.

Soon thereafter the Department proposed to Congress the enactment of the 1939 Choctaw statute, to convert the lands acquired for the Choctaws between 1918-1931 into trust lands held for all the Choctaws as defined in Section 19 of the I.R.A. and equate those lands with others acquired for the Choctaws pursuant to Section 5 of the I.R.A. As noted above, one purpose of the 1939 Act was to enable the Choctaws to organize a tribal government under Section 16 of the I.R.A.

In 1944 the Secretary exercised his authority pursuant to Section 7 of the I.R.A. to "proclaim" the Choctaw Reservation, and in 1945 he approved a tribal constitution for the Mississippi Band of Choctaw Indians.

The process followed in these steps had been outlined in a 1935 opinion of Assistant Interior Solicitor Felix Cohen, printed as Appendix F to the United States' Petition for Certiorari.

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[9] United States v. One Chevrolet Automobile, 16 F.Supp. 453 (D. Nev. May 1936), *aff'd. sub nom.* United States v. McGowan, 89 F.2d 201 (9th Cir. Mar. 1937), *reversed,* 302 U.S. 535 (Jan. 1938).

Also, the Government has for many years provided services to the Mississippi Choctaws comparable to those provided other Indians under federal supervision. For example, virtually all Choctaw children are educated in federal Indian schools. Note 43, *supra.*

Therefore, the Interior Department and Congress began to restore federal supervision over the Mississippi Choctaw in 1918, and the process culminated in 1944-45. These actions were taken based on the view of both branches that the Indian Reorganization Act applied to the Mississippi Choctaws. There is no basis in law or fact for the courts to overturn this interpretation, and the contrary rulings below are erroneous.

(2) The Relevant Acts of Congress Are Valid as Applied to the Choctaws.

The state decision below appears to rule that Congress lacked authority to establish the Choctaw Reservation and/or to apply the Major Crimes Act to defendant. The opinion holds: (1) These activities conflict with the Treaty of Dancing Rabbit Creek, "and it cannot be altered by an Act of Congress" (J.S. page 6a); (2) "Congress cannot obliterate the jurisdiction of Mississippi over its citizens." Id. In addition the opinion relies expressly on that court's prior decision in *Tubby* v. *State,* 327 So.2d 272 (Miss. 1976), which held that the Constitution precludes application of the Major Crimes Act to Mississippi Choctaws without state consent pursuant to the arensals and dockyards clause, art. I, § 8, cl. 17. 327 So.2d at 281-84.

The federal decision below purports to reserve the constitutional questions, but a prior decision of that court reached the same conclusions as the state court;

indeed the state court below quoted its holding from the earlier federal decision.[80]

It is of course clear that Congress can overrule, repeal, or limit an Indian treaty and has often done so.[81] The federal opinion below recognizes this and shifts the argument to the doctrine of repeal by implication. Pet. pages 18A-19A. However, this argument is flawed in several respects. First, as noted above (at page 10), the Treaty of Dancing Rabbit Creek was largely superseded in 1855. Second, the repeal aside, a problem with the view of both lower courts is their assumption that the Indian Reorganization Act, the 1939 Choctaw lands statute, and the Major Crimes Act are in conflict with the treaty. No treaty provision addresses criminal jurisdiction over the Choctaws, nor does any provision purport to restrain the United States from reestablishing federal supervision over Indians in Mississippi. The treaty provided for the cession of Choctaw lands in Mississippi to the United States, and the policy of the treaty was to induce removal to Indian Territory. Indians remaining in Mississippi (as permitted by the treaty) were not within Indian country, so that the special federal laws applicable thereto did not apply

[80] J.S. pp. 6a-8a, quoting from the second opinion in United States v. Mississippi Tax Com'n, 505 F.2d 633 (5th Cir. 1974), *rehearing denied*, 535 F.2d 300 (1976), *rehearing en banc denied*, 541 F.2d 469 (1976).

[81] *E.g.*, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 587-88 (1977); Lone Wolf v. Hitchcock, 187 U.S. 553, 555-56 (1903); *but see*, Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977), where the Court indicated that Congress' power must be rationally tied to the United States' unique obligation to the Indians. However, that standard is consistent with restoration of federal protection over the Choctaws in Mississippi.

to them, and most state laws did.[82] But that tacit result did not depend on any affirmative provision of the treaty.

Also, the matter is entirely within the province of Congress and the Executive Department, as expressly recognized in this Court's opinion in *Winton* v. *Amos*, 255 U.S. 373 (1921), a decision relied on by the federal court below. In that case, the Choctaw Nation (in Oklahoma) argued that Congress could not charge its treaty-granted property with the claim there at issue, but the Court rejected the argument, stating:

> It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property.

255 U.S. at 391-92.

The second argument against the power of Congress apparently focuses on the claim that the Choctaws were made citizens of Mississippi by state statute and constitution at the time of the Treaty of Dancing Rabbit Creek. J.S. page 6a; Pet. page 10A. Whether these acts made the Mississippi Choctaws citizens or not is debatable,[83] and the Choctaws were denied the political

[82] *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-50 (1973).

[83] The treaty did not directly confer citizenship on the Choctaws. Article 14 states that Choctaws "desirous" of becoming citizens could remain and receive land. In United States v. Boyd, 83 F. 547 (4th Cir. 1897), similar language in another treaty was construed only to permit the Indians to apply to the United States for naturalization. In United States v. Sandoval, 231 U.S. 28, 48 (1913), this Court expressly reserved a similar question. As for the state laws, citizenship is essentially a national matter over which the state have

rights of citizens until the 1960s.[84] Defendant concedes that he and other Choctaws have been legally citizens at least since 1924.[85] In either case, this Court has specifically held that citizenship of an Indian is irrelevant to application of the Major Crimes Act. In *Apapas* v. *United States,* 233 U.S. 587 (1914), defendant argued that he had been made a citizen by treaty. In *United States* v. *Celestine,* 215 U.S. 278 (1909), defendant was a citizen by statute. But in both cases the Court sustained Major Crimes Act jurisdiction notwithstanding. The Court has also held citizenship not incompatible with federal supervision over Indians in a variety of other contexts.[86] Furthermore, the view of the courts below would invalidate the Major Crimes Act entirely, because all Indians have been citizens at least since 1924.[87]

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little authority. Of course the states could confer broad state law rights on Indians irrespective of their national status as citizens. *Cf.*, The Kansas Indians, 72 U.S. (5 Wall.) 737, 744 (1867). Mississippi purported to do that *de jure,* but in fact denied the Choctaws most rights until recently.

[84] As noted in the Statement of the Case, the purpose of the 1829-30 Mississippi laws purporting to apply state laws to the Choctaws was to force their removal. As to the actual denial of the rights and benefits of citizenship, *see* note 41, *supra.*

[85] The Act of June 2, 1924, c.233, 43 Stat. 253, *as amended,* 8 U.S.C. § 1401(a)(2), conferred U.S. citizenship on all U.S.-born Indians not previously made citizens by other laws.

[86] *E.g.,* McClanahan v. Arizona Tax Com'n, 411 U.S. 164, 172-73 (1973); Creek County v. Seber, 318 U.S. 705, 718 (1943); United States v. Nice, 241 U.S. 591, 598 (1916); Bowling v. United States, 233 U.S. 528 (1914); United States v. Sandoval, 231 U.S. 28, 48 (1913); Hallowell v. United States, 221 U.S. 317, 324 (1911); Tiger v. Western Investment Co., 221 U.S. 286, 310-13 (1911); United States v. Rickert, 188 U.S. 432, 445 (1903).

[87] Note 85, *supra.*

The third contention of invalidity of the statutes as applied is that the consent of the state is required for federal jurisdiction over the Choctaws, relying on the arsenals and dockyards clause, Const., art. I, § 8, cl. 17. However, the authority of Congress over Indian affairs does not arise from that clause, but rather from the commerce clause and treaty power[88] and from the property clause.[89] In *United States* v. *McGowan,* 89 F.2d 201, 202 (9th Cir. 1937), the court held that application of an Indian country statute was precluded by the arsenals and dockyards clause, but this Court unanimously reversed, 302 U.S. 535 (1938). The Court also rejected a state consent argument in *Antoine* v. *Washington,* 420 U.S. 194, 200-05 (1975).[90]

The foregoing arguments can perhaps be summarized under a general claim that the federal government lacks authority to preempt jurisdiction over Indians within a state after statehood. However, this argument has been rejected by this Court in a number of contexts.[91]

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[88] McClanahan v. Arizona Tax Com'n, 411 U.S. 164, 172 n.7 (1973).

[89] Arizona v. California, 373 U.S. 546, 597-98 (1963); United States v. McGowan, 302 U.S. 535, 539 n.12 (1938); United States v. Celestine, 215 U.S. 278, 284 (1909).

[90] *See also,* L. Davis, Jurisdiction over Indian Country, 1 Ariz.L. Rev. 62, 65 (1959): ". . . [I]t is well established that no cession of jurisdiction by the state legislature, such as is required to establish exclusive federal jurisdiction over enclaves reserved for forts, magazines, arsenals, dock-yards and other needful buildings, is necessary to enable Congress to assume exclusive jurisdiction over Indians."

[91] Antoine v. Washington, 420 U.S. 194, 200-05 (1975); Arizona v. California, 373 U.S. 546, 597-98 (1963); Creek County v. Seber, 318 U.S. 705, 715-19 (1943); United States v. McGowan, 302 U.S. 535 (1938); Donnelly v. United States, 228 U.S. 243 (1913); United States v. Kagama, 118 U.S. 375 (1886).

For these reasons, there is no constitutional impediment to the application of the Major Crimes Act to defendant.

(3) The Choctaw Reservation is Included Within the Terms of 18 U.S.C. § 1151.

The federal opinion below holds that it was one purpose of 18 U.S.C. § 1151 to avoid "checkerboarding" of Indian country jurisdiction, citing this Court's decision in *Seymour* v. *Superintendent,* 368 U.S. 351 (1962). The opinion points out that the Choctaw Reservation includes a number of Choctaw communities separated from one another, and that noncontiguous tracts of land are involved. However, this reasoning misapplies the law.

As the Statement of the Case above indicates, the reservation does consist of seven noncontiguous Choctaw villages in several Mississippi counties. These have long been Choctaw settlements, and the federal land acquisition program of this century acquired trust lands where the Choctaws were already concentrated. Since the 1944 proclamation of the Secretary discussed in the federal opinion, the tribe and the B.I.A. have engaged in land consolidation at the seven sites, but these sites remain removed from one another. Nevertheless, *Seymour* v. *Superintendent, supra* does not support the decisions below in these cases.

In *Seymour* v. *Superintendent,* this Court was construing the phrase in 18 U.S.C. § 1151(a) including within Indian country all lands within "opened" Indian reservations "notwithstanding the issuance of any patent." This phrase codified certain decisions of the Court interpreting the Major Crimes Act, where the

Court had held that patented lands within reservations were included within the jurisdiction conferred by the Act.[92] The Court in *Seymour* noted that this had the effect of reducing the difficulties posed by "checkerboarding" of those reservation areas allotted and opened to non-Indian settlement. 368 U.S. at 357-58. Contrary to the federal opinion below (Pet. pages 5A-7A), the Court did not there determine that Congress specifically intended to avoid "checkerboarding," only that the Act had that effect. But even if Congress had so intended, that phrase in 18 U.S.C. § 1151(a) has no application to the instant case. There is no issue here regarding the boundaries of the Choctaw Reservation, nor is any fee land within a reservation at issue. The events in this case occurred on land held in trust by the United States for the Mississippi Choctaw Indians and proclaimed to be an Indian reservation in 1944.[93] As outlined earlier, the 1944 proclama-

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[92] United States v. Celestine, 215 U.S. 278 (1909); United States v. Thomas, 151 U.S. 577 (1894) (alternate holding). However, the Court's decisions on whether fee lands within reservations were "Indian country"—a term then not part of the Major Crimes Act—had created some uncertainty. Compare United States v. Soldana, 246 U.S. 530 (1918) with Clairmont v. United States, 225 U.S. 551 (1912). This uncertainty was eliminated by enactment of 18 U.S.C. § 1151(a).

[93] The situation of the Choctaw Reservation does not present the same practical problems as that recited in the opinion in Seymour v. Superintendent, *supra*. In *Seymour*, much of the land within the reservation was individually owned either by allotted Indians or by non-Indians and subject to individual sale. Thus if Indian country changed with ownership, it could change upon an individual transaction. By contrast the Choctaw Reservation lands are all held in tribal trust by the United States. Thus the Choctaw boundaries may be irregular but are not subject to the vicissitudes of individual sale. This greater permanence reduces practical difficulties.

tion brought the Reservation within the pre-1948 Major Crimes Act. There is certainly no basis whatsoever for interpreting the 1948 Act to remove any Indian reservation from the Major Crimes Act.

The 1948 Act did not eliminate "checkerboarding," it only removed one particular source of it, that is, the allotment and opening of some Indian reservations. Reservations such as Choctaw which were created as non-contiguous villages were not to be destroyed. More importantly, 18 U.S.C. § 1151(c), defining all trust or restricted Indian allotments as Indian country, obviously has the effect of preserving non-contiguous areas of Indian country. In so doing Congress only codified prior decisions of this Court.[94] The Court has since expressly recognized that some statutes and agreements terminated or reduced Indian reservations, leaving only non-contiguous trust allotments as Indian country.[95]

18 U.S.C. § 1151(b), designating "dependent Indian communities" as Indian country, also demonstrates the error of the federal decision below. As noted above, that statute codified this Court's decision in *United States* v. *McGowan,* 302 U.S. 535 (1938), holding that land purchased and taken in trust for the residence of Nevada Indians became Indian country. In *United States* v. *Martine,* 442 F.2d 1022 (10th Cir. 1971), the court held that a Navajo community

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[94] United States v. Ramsey, 271 U.S. 467 (1926); United States v. Pelican, 232 U.S. 442 (1914). In the latter case the Court expressly rejected a "checkerboarding" argument much like that in the federal opinion below. 232 U.S. at 449-50.

[95] DeCoteau v. District County Court, 420 U.S. 425, 427-28 and n.2 (1975); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

outside the Navajo Reservation proper but almost entirely Navajo, on trust lands, and under federal supervision, is a dependent Indian community within the meaning of Section 1151(b).

The enactment of 18 U.S.C. § 1151 was not intended to alter prior law in any way relevant to this case, and the conclusion of the federal decision below that the statute excluded the Choctaw Reservation is erroneous.

C. Defendant Is An Indian.

Major Crimes Act jurisdiction also requires that defendant be an Indian within the meaning of that designation in federal law. As already noted, the opinions below incorrectly rely on the citizenship of the Indians to remove the Choctaws from the Major Crimes Act (see above pp. 35-36). The state decision below otherwise accepts that defendant is Indian, but the federal opinion does not.

The facts are not in dispute. Defendant is of full Choctaw Indian ancestry and is enrolled at the Choctaw Agency of the Bureau of Indian Affairs, Philadelphia, Mississippi. While the Treaty of Dancing Rabbit Creek sought to induce the removal of as many Choctaws as possible, Article 14 allowed Choctaws to remain in Mississippi and stipulated that they should "not lose the privilege of a Choctaw citizen." Federal policy between 1830-1906 favored their removal, but they were repeatedly referred to as Indians in various statutes,[96] and those willing to go to Indian Territory

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[96] *See* Statutes cited *supra* in n.21; *see also* 5 Stat. 180 (1837); 5 Stat. 211 (1838); 5 Stat. 513 (1842); 9 Stat. 33-34 (1846); 9

were able to share in most tribal rights.[97]

As already detailed, Congress and the Interior Department fully restored federal supervision between 1908-1944. Numerous statutes of this period refer to the Mississippi Choctaws specifically as Indians,[98] and the Interior Department has manifestly treated them as such.

Despite these facts, the federal opinion below rules that the Choctaws are "terminated" from federal supervision and thus not Indians within the meaning of the Major Crimes Act. Pet. pages 8A-12A. The court relies on footnote 7 to this Court's recent opinion in *United States* v. *Antelope,* 430 U.S. 641, 646-7 (1977). The reference there is to a Klamath Indian expressly terminated by a specific federal statute, 25 U.S.C. § 564-564x. Section 564q states that:

> [A]ll statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

No such provision of law has ever been applied to the Choctaws. As already noted, the Treaty of Dancing Rabbit Creek ceded existing tribal lands in Mississippi and thus indirectly applied state laws to any Indians

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Stat. 114 (1846); 9 Stat. 145 (1847); 9 Stat. 555-56 (1850); 9 Stat. 572 (1851); 9 Stat. 587 (1851) ("Indians in the old States"); 10 Stat. 15 (1852); 10 Stat. 41-42 (1852); 10 Stat. 226 (1853).

[97] *See* the discussion in Choctaw Nation v. U.S., 81 Ct.Cl. 1 (1935).

[98] *See* particularly the 1939 Choctaw statute, 53 Stat. 851, *supra.* See also the discussion *supra* in the Statement of the Case, page 11.

(Choctaw or other) who happened thereafter to be in the state, until Indian trust lands were reestablished. But the termination laws such as 25 U.S.C. § 564q quoted above eliminate Indian status everywhere throughout the United States for those affected.[99] Yet even after 1830, Mississippi Choctaws could receive full federal Indian services and protection by going to Indian Territory or other Indian country. They have never been treated as terminated.

Furthermore Congress has exercised the prerogative of restoring Indian status to at least one tribe which had been formally terminated. 25 U.S.C. §§ 903-03f, repealing 25 U.S.C. §§ 899-902.[100]

For these reasons, defendant is not "terminated".

Both opinions below also rely to some extent on their conclusion that the Mississippi Band of Choctaw Indians is not an Indian tribe, or is not a separate tribe from the Oklahoma Choctaws. This is not relevant to application of the Major Crimes Act, which requires only that defendant be Indian. But the conclusion is also incorrect.

The Interior Department began to deal with the Mississippi Choctaws as a separate political body at least by 1935, when it conducted an election among them on

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[99] *See, e.g.,* United States v. Heath, 509 F.2d 16 (9th Cir. 1974). As the quoted statute makes clear, "terminated" Indians may not receive federal services available to Indians. Thus the view of the federal court below that the Choctaws could be terminated but continue to receive federal services is erroneous. Pet. pp. 20A-22A.

[100] This Court's interpretation of the latter statute in Menominee Tribe v. United States, 391 U.S. 404 (1968), stands for the rule that even explicit termination statutes are strictly construed in favor of Indian rights.

whether to accept or reject the Indian Reorganization Act. See footnote 30 above and text. In 1945 the Secretary approved the Mississippi Band's constitution pursuant to Section 16 of the IRA.[101] As discussed above, these actions were authorized by Congress. See pages 30-32.

This Court has long followed the rule that recognition of Indian tribes is a matter committed to the Legislative and Executive Branches. In *United States* v. *Holliday,* 70 U.S. (3 Wall.) 407, 419 (1866), the Court stated:

> In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

This rule has consistently been followed in subsequent cases.[102] In *United States* v. *Sandoval,* 231 U.S. 28, 46 (1913), the Court stated that the standard of judicial review in such cases is whether the decision is "arbitrary" and "manifestly unauthorized." By the standards of that decision, the Mississippi Choctaws have been properly recognized.

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[101] Current official publications list the Mississippi Band of Choctaw Indians as a federally recognized tribal group. *E.g.,* U.S. Department of the Interior, Bureau of Indian Affairs, American Indians and Their Federal Relationship (GPO 1972) p. 19; U.S. Dept. of Commerce, Federal and State Indian Reservations and Indian Trust Areas (GPO 1974) p. 265.

[102] *See* United States v. Forty-three Gallons of Whisky (Lariviere), 93 U.S. 188, 195 (1876); United States v. Candelaria, 271 U.S. 432 (1926); Baker v. Carr, 369 U.S. 186, 215-17 (1962); Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83-89 (1977).

The courts below disregarded this rule by giving no weight to the actions of Congress and the Interior Department. This error was apparently also influenced by according undue weight to the Treaty of Dancing Rabbit Creek.[103]

Many Indian tribes have been dealt with by the Government in separate groups, bands, or sub-tribes, according to the situation, and no court prior to the decisions concerning the Mississippi Choctaws has ever questioned the practice. Numerous treaties and laws treat with or apply to distinct groups of such well known tribes as the Sioux, Chippewa, and Apache. *See generally C. Kappler, Indian Affairs, Laws & Treaties* (GPO 1904-41). Organized tribes and bands recognized today include 16 groups of Sioux, 13 groups of Chippewa, and 10 groups of Apache, each residing on separate reservations.[104] No reason has been suggested why a different rule should be applied to the Choctaws.

Therefore no doubt can exist that defendant is properly treated as an Indian under federal law, including the Major Crimes Act.

D. Mississippi Has Not Acquired Jurisdiction Pursuant to Public Law 280.

Public Law 280 authorizes a state to acquire jurisdiction over Indian country therein and prescribes the

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[103] J.S. p. 6a; 535 F.2d at 302; both discussed *supra* at n.81 and text.

[104] *See* U.S. Dept. of Commerce, Federal and State Indian Reservations and Indian Trust Areas (GPO 1974) pp. 245, 253, 255, 259, 279, 291, 430, 433, 489, 492, 494, 496, 498, 500, 502, 505 (Sioux); pp. 227, 232, 234, 237, 240, 243, 247, 250, 257, 261, 285, 435, 579, 582, 584, 587, 593, 595 (Chippewa); pp. 39, 46, 49, 69, 72, 356, 362, 456, 462 (Apache).

method for doing so.[105] Where the criminal portion of that Act is applicable, Major Crimes Act jurisdiction is supplanted by state court jurisdiction.[106] The state court below in its prior decision in *Tubby* v. *State,* 327 So.2d 272, 285-88 (Miss. 1976), held that the 1972 amendment to the Mississippi Constitution which removed from it a possible impediment to Indians voting[107] constituted compliance with Public Law 280. This is clearly incorrect. Not only was that amendment not directed to Indian country or to court jurisdiction (the subjects of Public Law 280), but the law since 1968 has required Indian consent by referendum, and the Choctaws have not consented. 25 U.S.C. § 1326. This court has held that Public Law 280 requires strict compliance for a state to acquire jurisdiction. *Kennerly* v. *District Court,* 400 U.S. 423 (1971).[108]

Neither Public Law 280 nor any other federal law confers state jurisdiction over the Choctaw Reservation.

III. THE STATE DISTRICT COURT LACKED JURISDICTION.

A. The General Rule.

This Court has long held that federal jurisdiction pursuant to the Indian Major Crimes Act is exclusive of state jurisdiction. In its first interpretation of the

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[105] Act of Aug. 15, 1953, c.505, 67 Stat. 588, codified in part as 18 U.S.C. § 1162, 28 U.S.C. § 1360; amended, 25 U.S.C. §§ 1321-26. *See, e.g.,* Kennerly v. District Court, 400 U.S. 423 (1971).

[106] 18 U.S.C. § 1162(c).

[107] *See* note 40 above and text.

[108] As noted above at n.37 and text, the Mississippi Legislature in 1829 passed a statute purporting to apply state law to the Choctaws, but it was repealed in 1857.

Act, *United States* v. *Kagama,* 118 U.S. 375, 384-85 (1886), the Court sustained federal jurisdiction and indicated that there was no state court jurisdiction. Subsequent decisions have granted habeas corpus from state custody. *Seymour* v. *Superintendent,* 368 U.S. 351 (1962); *Rice* v. *Olson,* 324 U.S. 786 (1945). The lower federal courts have adhered to the same rule.[109]

As the *Kagama* opinion indicates, the states lack jurisdiction over reservation Indians exercising tribal self-government even in the absence of the express federal statutory jurisdiction.[110] The tribal courts have exclusive authority over most minor crimes.[111] Neither opinion below disagrees, as both are grounded expressly on the lack of federal jurisdiction. In fact the state opinion acknowledges that "[b]oth courts could not have jurisdiction. . . ." J. S. page 4a.

For these reasons state court jurisdiction to prosecute defendant is preempted both by Choctaw status as a self-governing tribe under the Indian Reorganization Act, and by the Major Crimes Act and related federal laws.

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[109] Youngbear v. Brewer, 415 F.Supp. 807 (N.D.Iowa 1976), *aff'd,* 549 F.2d 74 (8th Cir. 1977); In re Carmen's Petition, 165 F.Supp. 942 (N.D.Calif. 1958), *aff'd sub. nom.* Dickson v. Carmen, 270 F.2d 809 (9th Cir. 1959), *cert. denied,* 361 U.S. 934; Ex parte Konaha, 43 F.Supp. 747 (E.D.Wis 1942), *aff'd,* 131 F.2d 737 (7th Cir. 1942); Ex parte Pero, 99 F.2d 28 (7th Cir. 1938), *cert. denied,* 306 U.S. 643; Ex parte Van Moore, 221 F. 954 (D.S.Dak. 1915).

[110] *See also* Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); Fisher v. District Court, 424 U.S. 382 (1976); McClanahan v. Arizona Tax Com'n, 411 U.S. 164 (1973).

[111] *See* Keeble v. United States, 412 U.S. 205, 209-10, 214 (1973); 25 C.F.R. part 11; T. Vollmann, Criminal Jurisdiction in Indian Country, 22 Kans.L.Rev. 387, 390 (1974).

The only case with any language possibly deviating from this rule is *United States* v. *Hornbuckle,* 422 F.2d 391 (4th Cir. 1970), affirming the federal conviction of a Cherokee under the Major Crimes Act for felony assault occurring within the reservation of the Eastern Cherokees. But the court states in *dictum* that "the United States and North Carolina exercise concurrent criminal jurisdiction over the reservation."

Hornbuckle is of course squarely at odds with both decisions below in its interpretation of the Major Crimes Act, since it holds the Cherokee Reservation to be Indian country and within the Major Crimes Act, and it recognizes the Cherokees as Indians within the Major Crimes Act meaning of the term.[112] However, the *dictum* about concurrent jurisdiction requires further examination.

It must first be recognized that "concurrent" can have different meanings when applied to the Indian country. In one sense of the word all Indian country jurisdiction is concurrent among federal, state and tribal authority. It is well established that states have criminal[113] and civil[114] jurisdiction over non-Indians in Indian country in matters not affecting Indians or infringing tribal self-government. Here the term "concurrent" refers not to concurrent jurisdiction over the same events and persons, only to concurrent jurisdiction over the same territory but over different persons and subject matters.

[112] *See also* United States v. Lossiah, 537 F.2d 1250 (4th Cir. 1976) (Major Crimes Act prosecution for murder); R. Clinton, Criminal Jurisdiction Over Indian Lands, 18 Ariz.L.Rev. 503, 511 (1977).

[113] New York ex rel. Ray v. Martin, 326 U.S. 496 (1946); United States v. McBratney, 104 U.S. 621 (1882).

[114] Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 481-83 (1976); Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906); *see also* McClanahan v. Arizona Tax Com'n, 411 U.S. 164, 179 (1973) (dictum).

The use of "concurrent" in *Hornbuckle* is uncertain, because the decision is a summary affirmance including no discussion of the issue. But it may be that the *dictum* used the word to refer to concurrent jurisdiction over the same persons, subject matter, and events. Concurrent state and federal jurisdiction of this sort should be rejected in the instant cases for a number of reasons.

As already noted Major Crimes Act jurisdiction has been consistently held to be exclusive of state jurisdiction by this Court and the lower federal courts. No valid reason exists to have a different rule for Mississippi or the Choctaws (or for North Carolina). Also, concurrent jurisdiction would be contrary to the protective purpose of Major Crimes Act jurisdiction. *See United States* v. *Kagama,* 118 U.S. 375, 384-85 (1886). A further problem with concurrent jurisdiction over the same persons and events is the double jeopardy issue discussed in the next subsection.

This is not merely a matter of concurrent judicial jurisdiction (such as in diversity cases); most Major Crimes Act offenses have a federal substantive definition and punishment, and these differ from some state definitions. While concurrent jurisdiction over minor offenses might be manageable, the Major Crimes Act covers the most serious crimes. Where one jurisdiction has the death penalty or the felony murder rule but the other does not, the random election of one prosecutor or the other has very serious consequences. In *United States* v. *Antelope,* 430 U.S. 641, (1977), the Court sustained a difference in rule between federal and state

prosecutions of *different* persons, upholding federal authority over Indians as a separate people. But a like disparity of treatment over the same defendant depending only on which jurisdiction determines to prosecute first is much more difficult to justify. As this Court stated in a different context, "If under the control of Congress, from necessity, there can be no divided authority." *The Kansas Indians,* 72 U.S. (5 Wall). 737, 755 (1867).[115]

The considerations outlined here were one factor in the decision in *Youngbear* v. *Brewer,* 415 F.Supp. 807 (N.D.Iowa 1976), *aff'd,* 549 F.2d 74 (8th Cir. 1977), construing an ambiguous statute not to create concurrent state-federal jurisdiction over murder in Indian country in Iowa. That case, like this one, also involved Indian country reestablished after statehood and a removal treaty, and in that respect it conflicts with the decisions below.

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[115] *See also* State v. Campbell, 53 Minn. 354, 55 N.W. 553, 555 (1893), where the court reversed the state conviction of a reservation Indian, observing, "It would never do to have both the United States and the state legislating on the same subject." In a later case this Court said:

> Subjection to both state and national law in the same matter might often be impossible . . . the question is not whether a particular right may be enforced in either a court of the state or one of the nation, but whether two sovereignties can create independent duties and compel obedience . . .
>
> It is true the same act may often be a violation of both the state and Federal law, but it is only when those laws occupy different planes.

In re Heff, 197 U.S. 488, 506-07 (1905). On the merits the Court then decided in favor of state jurisdiction, and in this respect *Heff* was expressly overruled by United States v. Nice, 241 U.S. 591, 601 (1916). However, the quoted language was not questioned or limited in *Nice.*

B. Double Jeopardy Bars the State Reprosecution

The state prosecution below is also barred by the double jeopardy clause of the fifth amendment as applied to the state by the fourteenth amendment. *Benton* v. *Maryland,* 395 U.S. 784 (1969). The Court has held that successive federal and state prosecutions are not barred by the double jeopardy clause under the "separate sovereign" rule. *Bartkus* v. *Illinois,* 359 U.S. 121 (1959); *Abbate* v. *United States,* 359 U.S. 187 (1959).[116] However, these cases arose in the usual context of interstitial federal criminal law, involving at least some difference in definition from the state offense. By contrast Major Crime Act prosecutions will sometimes involve definitions very similar or identical to state law. In the case of burglary and incest, the Major Crimes Act adopts state law to define the offenses, so these offenses are precisely the same in both courts. Also, the societal interest being vindicated in both federal and state prosecutions is the same, the public peace of the Reservation area. The rule of *Bartkus* and *Abbate,* much criticized in any case,[117] should not be extended to the present situation, where the state and federal laws serve the same purposes. (*Cf., Commonwealth* v. *Mills,* 447 Pa. 163, 286 A.2d 638 (1971).

Defendant was acquitted of felony assault by a federal trial jury. His retrial in state court on the same charge based on the same events should be barred by the double jeopardy clause.

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[116] Mississippi follows the same rule. Bankston v. State, 236 So.2d 757 (Miss. 1970).

[117] Fisher, Double Jeopardy, Two Sovereignties and the Intruding Constitution, 28 U.Chi.L.Rev. 591 (1961); Pontikes, Dual Sovereignty and Double Jeopardy, 14 Wes.Res.L.Rev. 700 (1963); Fisher, Double Jeopardy and Federalism, 50 Minn.L.Rev. 607 (1966).

IV. DOUBTS ARE TO BE RESOLVED IN FAVOR OF THE INDIANS AND OF FEDERAL PROTECTION.

Defendant views the applicable laws in this case as reasonably clear and free from doubt, as discussed in the previous sections of this brief. But to the extent that any doubts or ambiguities exist in any of the Indian statutes, it is well established that they are to be resolved in favor of the Indians. *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78, 89 (1918). The Court has applied this rule to favor federal protection and tribal self-government over competing state jurisdiction. *Bryan* v. *Itasca County,* 426 U.S. 373, 392-93 (1976); *McClanahan v. Arizona Tax Com'n,* 411 U.S. 164, 174-75 (1973); *see United States* v. *Kagama,* 118 U.S. 375, 384 (1886).

CONCLUSION

The opinions below ignored numerous controlling decisions of this Court and are at odds with accepted principles of federal Indian law. They should be reversed.

As to Smith John, the Court is requested to remand No. 77-575 to the Supreme Court of Mississippi with instructions to dismiss the charges against him, and to remand No. 77-836 to the Court of Appeals with instructions to decide the appeal on the original issue raised.

As to Harry Smith John, the Court is requested to remand both cases to the lower courts with instructions to dismiss them as moot.

Respectfully submitted,

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February 1978

APPENDIX

Appendix 1

Act of June 21, 1939, c. 235, 53 Stat. 851

AN ACT

To define the status of certain lands purchased for the Choctaw Indians, Mississippi.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title to all lands purchased by the United States for the benefit of the Choctaw Indians of Mississippi, under authority contained in the Act of May 25, 1918 (40 Stat. L., 573), and similar subsequent Acts, not under contract for resale to Choctaw Indians, or on which existing contracts of resale may hereafter be canceled, is hereby declared to be in the United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior.

Appendix 2

25 U.S.C.

§ 465. Acquisition of lands, water rights or surface rights: appropriation; title to lands; tax exemption

The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided,* That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and

such lands or rights shall be exempt from State and local taxation.

25 U.S.C.

§ 467. New Indian reservations

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by sections 461, 462, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title or to add such lands to existing reservations: *Provided,* That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

25 U.S.C.

§ 479. Definitions

The term "Indian" as used in sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of said sections, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in said sections shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in said sections shall be construed to refer to Indians who have attained the age of twenty-one years.

Appendix 3

18 U.S.C.

§ 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Appendix 4

18 U.S.C.

SECTION 1153. OFFENSES COMMITTED WITHIN INDIAN COUNTRY

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, . . . assault with intent to kill, . . . within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. . . .

• • •

Note: Shown as in force on August 30, 1975. Amended by the Act of May 29, 1976, Pub.L. 94-297, § 2, 90 Stat. 585.

18 U.S.C.

§ 3242. Indians committing certain offenses; acts on reservations

All Indians committing any of the following offenses; namely, . . . assault with intent to kill, . . . on and within the Indian country shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

Note: Shown as in force on August 30, 1975. Amended by the Act of May 29, 1976, Pub.L. 94-297, § 4, 90 Stat. 586.

Appendix 5

Treaty With The Choctaws

September 27, 1830, 7 Stat. 333

. . . Article XIV. Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the Agent within six months from the ratification of this Treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one half that quantity for each unmarried child which is living with him over ten years of age; and a quarter section to such child as may be under 10 years of age, to adjoin the location of the parent. If they reside upon said lands intending to become citizens of the States for five years after the ratification of this Treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvements of the head of the family, or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity . . .

FOR ARGUMENT

Supreme Court, U. S.
FILED
1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-575

SMITH JOHN and HARRY SMITH JOHN, *Appellants,*

vs.

STATE OF MISSISSIPPI, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

and

No. 77-836

UNITED STATES OF AMERICA, *Petitioner,*

vs.

SMITH JOHN and HARRY SMITH JOHN, *Respondents.*

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE STATE OF MISSISSIPPI

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-575

SMITH JOHN and HARRY SMITH JOHN, *Appellants*,

vs.

STATE OF MISSISSIPPI, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

and

No. 77-836

UNITED STATES OF AMERICA, *Petitioner*,

vs.

SMITH JOHN and HARRY SMITH JOHN, *Respondents*.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE STATE OF MISSISSIPPI

Consolidation of these cases recognizes the same basic question involved in both: the legal position and status of the Choctaws of Mississippi. Briefs filed herein by Appellants-Respondents, Smith John and Harry Smith John, and Petitioner, United States of America, acknowledge a viewpoint on the question contrary to that of the State of Mississippi (Mississippi). Therefore, of necessity and in the interest of consolidating and focusing argumentation, this brief will reply to positions advanced by both Appellants-Respondents (John) and Petitioner (Government).

JURISDICTION

On January 16, 1975, this Court postponed the question of jurisdiction in No. 77-575 which appellant claims to lie pursuant to 28 U.S.C. §1257(1) and/or 28 U.S.C. §1257(2). Therefore, appellee has briefed its position opposing such claim under Argument.

Jurisdiction is invoked over No. 77-836 under 28 U.S.C. §1254(1).[1]

STATEMENT OF THE CASES

A. The Federal Courts Below

Mississippi residents of Choctaw Indian blood (John) were indicted by a federal grand jury in October, 1975; tried before the United States District Court for the Southern District of Mississippi December 8-9, 1975; and were convicted of simple assault. They appealed to the United States Fifth Circuit Court of Appeals.

In July, 1976, the Fifth Circuit requested the Department of Justice to brief the issue of whether the district court had jurisdiction, pursuant to 18 U.S.C. 1153, to try the case and, in particular, whether the alleged offense occurred in Indian country within the meaning of that statute. (The parties, John and the Government, had stipulated that the alleged crime occurred on land within Indian country.)

On October 11, 1977, the Fifth Circuit stated:

> We hold that the lands in the various tracts of the Mississippi Choctaw Indian "Reservation" are not within "Indian Country", as contemplated by 18 U.S.C. §§1151, 1153. We further hold that to date the inherent police power of the State of Mississippi over its emancipated Indian citizens of Choctaw blood stands unimpaired. This, however, has nothing to do with the legality of the congressional policy of benevolence toward the Mississippi Choctaws as begun in 1918 and since pursued.
>
> The District Court was without subject matter jurisdiction of these prosecutions.

The convictions were reversed and the case remanded to the District Court with instructions to set them aside and dismiss the indictment. The Fifth Circuit opinion is now before this Court on review and is attached as Appendix to the Motion to Dismiss.

B. The Mississippi Courts Below.

In April, 1976, John was indicted by the Leake County, Mississippi, Grand Jury on the charge of aggravated assault. The motion to dismiss was denied and after trial before a jury on May 7, 1976, John was convicted and sentenced to the Mississippi State Penitentiary. (This sentence has not been served since John has remained free on bond.)

Upon appeal, the Mississippi Supreme Court affirmed the conviction. Under date of May 11, 1977, it issued an opinion quoting extensively from the Fifth Circuit Court of Appeals in *United States* v. *State Tax Commission*, 505 F.2d 633 (5th Cir. 1974), *rehearing denied*, 535 F.2d 300 (1976), *rehearing en banc denied*, 541 F.2d 469 (1976)[2]

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1. In addition to cases cited herein, Mississippi continues to rely on cases cited in the Motion To Dismiss filed in No. 77-575.

2. These opinions are reprinted in the Appendix to this brief because of their detailed consideration of issues now before the Court in these consolidated cases.

and stating that its "holding is persuasive on the issues involved in this case." In particular, the Mississippi Supreme Court noted the Fifth Circuit's opinion that after the Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1830), the Choctaws who remained in Mississippi were no longer an Indian Tribe but were emancipated citizens of Mississippi, not wards of the United States, and did not live in Indian country. The Supreme Court of Mississippi stated, in part:

> The fallacy of defendants' argument is that the United States District Court had no jurisdiction to try them under Major Crimes Act, 18 U.S.C.A. §1153. There is no Indian country in Mississippi, the defendants are citizens of Mississippi subject to its laws, and therefore are subject to prosecution in its courts. . . .

Thus the May 11, 1977 opinion of the Mississippi Supreme Court is in essential agreement with the October 11, 1977 opinion (and previous opinions) of the United States Fifth Circuit Court of Appeals and both are before this Court under consolidation. A copy of the opinion below is before this Court as Appendix to the Jurisdictional Statement.

SUMMARY OF ARGUMENT

Acts of Congress and Mississippi statutes were not so drawn in question in No. 77-575 as to meet the requisites for appeal under 28 U.S.C. §1257(2) or §1257(1).

The fundamental question of jurisdiction, federal or state, over Mississippi citizens of Choctaw Indian blood is before the Court in these consolidated cases. The position of Mississippi is that the Choctaw *tribe* removed from Mississippi in the early 1830's in accordance with a treaty

between the tribe and the United States. By the terms of this treaty, individual Choctaws were permitted to remain in Mississippi as citizens. Those who remained were emancipated from federal control, have remained so emancipated to the present, and, absent Congressional enactments to the contrary, will remain so emancipated. These persons are, therefore, subject to the jurisdiction of the State of Mississippi as are its other citizens, and there is no valid, lawful or proper reason for them to be subject to exclusive federal jurisdiction.

More specifically, the tribal character of Choctaw Indians in Mississippi ended when the United States Senate ratified the Treaty of Dancing Rabbit Creek in 1831. Mississippi Choctaws who elected to remain in the state rather than remove to western Indian territory became citizens of the state, and they and their descendants were largely ignored by the federal government for some ninety years following the treaty. Mississippi Choctaw citizens did not become a tribe, did not live on a reservation in Indian country, and did not become wards of the federal government as a result of the Indian Reorganization Act (1934) and a proclamation of the Department of Interior (1944).

Consequently, provisions of the United States Code dealing with Indian reservations, Indian country, and Indian crimes are inapplicable to Mississippi Choctaws. Therefore, state rather than federal jurisdiction should obtain in these consolidated cases.

A brief review of the history of the Choctaws supports this argument.

The aboriginal Choctaws of Mississippi, Alabama, and Louisiana lived in close proximity to and in harmonious relations with the French colonials (from 1699), the Spanish (1781), and the Americans (after 1798). Neither the Act of March 1, 1817 (3 Stat. 348) enabling the people

of the Mississippi Territory to prepare for statehood nor the resolution of December 10, 1817 (3 Stat. 472) admitting Mississippi as the 20th state in the Union made any mention of the Choctaw residents.

Migration into the territory and the new state brought pressure for a removal of the native Indians to unsettled territory in the west. National policy at the time supported such removal. Treaties were made between the United States and the Choctaw Tribe in 1786 (7 Stat. 21), 1801 (7 Stat. 66), 1802 (7 Stat. 73), 1803 (7 Stat. 80), 1805 (7 Stat. 98), 1816 (7 Stat. 152), 1820 (7 Stat. 210) and 1825 (7 Stat. 234). In 1829 the Mississippi Legislature extended legal process into that portion of the state occupied by the Choctaws and, in 1830, abolished the government of the Choctaws, granted them full citizenship and extended the laws of the state over them. Later that year, the United States and the Choctaw Nation entered into the Treaty of Dancing Rabbit Creek (7 Stat. 333) providing for the final removal of the tribe to the west. This treaty was ratified by the United States Senate February 24, 1831.

The language of the treaty recognized the fact that Mississippi had extended its laws over the Choctaws. Article XIV provided for Choctaws who so wished to remain in the state as citizens. The majority of the Choctaws removed to the western territory, and the tribal character of Choctaw Indians in Mississippi ended.

The Choctaws who remained in Mississippi were not wards of the federal government or wards of any government. They were individual citizens. Some prospered (Greenwood Leflore, a former Choctaw Chief, became a Mississippi State Senator; the city of Greenwood and the County of Leflore are named for him); others did not.

They lived in many different parts of the state and in neighboring states.

In the late 1800's, Congress undertook a program designed to terminate the existing tribal governments in the Indian Territory. At this time Mississippi Choctaws were permitted to rejoin the Choctaw Tribe in the west and some did so. With the passage of the Act of April 26, 1906, providing for the final winding up of tribal affairs and the admission of Oklahoma as a state in 1907, the Choctaw Tribe effectively passed out of existence as a separate political entity.[3]

During the period 1908-1918, Members of Congress from Mississippi made repeated attempts to have Congress reopen the Choctaw rolls in Oklahoma so that Mississippi Choctaws could join their people in the west; these efforts failed.

In 1918 conditions among certain Mississippi Choctaws prompted Congress to provide through an appropriation bill for "the relief of [their] distress". This gratuity did not recognize the Choctaws as a tribe, made no mention of any Indian reservation and did not state that the Mississippi Choctaws were wards of the government. The act contained repayment provisions.

From 1918 to 1931 other funds were appropriated for the purchase of lands to be sold to individual Mississippi Choctaws. Various tracts, totaling some 3,680 acres, were purchased during this period and sold on a reimbursable basis; all purchasers defaulted in payment.

In 1934 two opposing factions of Choctaw Indians in Mississippi organized: the Mississippi Choctaw Indian

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3. *Choctaw Nation* v. *United States*, 397 U.S. 620 (1970); *Choctaw Nation* v. *United States*, 119 U.S. 1 (1886); *Choctaw Nation* v. *United States*, 81 Ct. Cl. 1 (1935).

Federation and the Choctaw Business Committee. The latter was recognized and approved by Indian Bureau representatives in the area and, under federal tutelage, this group voted, in March, 1935, to "accept the provisions" of the Indian Reorganization Act of June 18, 1934.

In 1936 confusion over the status of the lands purchased for the Mississippi Choctaws prompted a Memorandum Opinion from the Solicitor of the Department of Interior. He stated, among other things, ". . . there is in fact no existing tribe of Indians in Mississippi known as the Choctaw Tribe. The Choctaw tribe or nation of Indians, formerly of Mississippi, removed to Oklahoma and became one of the Five Civilized Tribes."

In 1939, Congress acted "To define the status of certain lands purchased for the Choctaw Indians" in Mississippi and title to the lands was "declared to be in the United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior." 53 Stat. 851 (1939).

In 1944, relying on the land purchases, the Indian Reorganization Act, and the land status act of 1939, an Assistant Secretary of the Interior issued a proclamation purporting to recognize the "tribal" organization of the Mississippi Band of Choctaw Indians and declaring the lands purchased to be an Indian reservation.

(A 1974 survey indicates that Choctaws presently live in most of Mississippi's counties and in Western Tennessee and states that "Seven geographically-distinct communities, spanning seven counties in east central Mississippi, comprise the Choctaw reservation area".)

In 1975, Appellants-Respondents (John) were charged with a federal crime alleged to have taken place "in Leake

County, Mississippi, in the NE 1/4 of Section 35, Township 11 N Range 7 E, . . . on and within the Choctaw Indian Reservation and on land within the jurisdiction of the United States of America . . . in violation of Sections 1153 and 113(a), Title 18, United States Code."

Mississippi contends that the lands described in the indictment are not in Indian country and that, therefore, 18 U.S.C. §1153 did not and could not confer subject matter jurisdiction on the federal court.

This contention is based on assertions that: (1) there has been no lawfully constituted Indian *tribe* in Mississippi since 1830-31; (2) Mississippi Choctaws have been citizens of the state and not wards of the federal government since the Treaty of Dancing Rabbit Creek; (3) Congress has not recognized Mississippi Choctaws as a tribe since 1830-31 and that this posture has been deliberate; (4) appropriations for relief measures and land purchases have not created a tribe, established a reservation, or removed the emancipated status of Mississippi Choctaws; (5) the plain language of the Indian Reorganization Act indicates that it has no applicability to Mississippi Choctaws; (6) the Act of June 21, 1939 merely clarified and defined the status of certain lands purchased in Mississippi and was not operative to create a tribe, a reservation, or a wardship relation; (7) that the 1944 proclamation of the Department of the Interior (relying on and grounded in the land purchases and Indian Reorganization Act) is of no binding force regarding Mississippi's jurisdiction over its citizens; and that (8) provisions of the United States Code dealing with Indian country and crimes thereon are inapplicable to the present case.

ARGUMENT

A. Jurisdiction Does Not Lie Over No. 77-575 As an Appeal.

Pursuant to this Court's order postponing the question of jurisdiction in No. 77-575 to the hearing of the case on the merits, 46 U.S.L.W. 3453, appellee submits and will show that jurisdiction does not lie under 28 U.S.C. §1257(2) or under 28 U.S.C. §1257(1).

In regard to 28 U.S.C. §1257(2), appellant contends that the validity of Miss. Code Ann. §97-3-7(2) (Supp. 1977), as applied to him, was drawn in question. To this contention he now for the first time adds and challenges all "general state laws conferring jurisdiction on the trial court, authorizing arrests, authorizing indictments, etc." Appellee submits the Motion to Dismiss was insufficient to draw in question the state laws for jurisdiction as appeal.

An assertion that appellant's federal rights make him immune from state prosecution is insufficient to draw in question the validity of the state statute, *Rust Land & L. Co.* v. *Jackson*, 250 U.S. 71 (1918), and a challenge to the court's power to proceed to a decision on the merits does not draw in question authority exercised under a state statute. *Philadelphia and R. C. and I. Co.* v. *Gilbert*, 245 U.S. 162 (1917). The validity of Miss. Code Ann. §97-3-7(2) (Supp. 1977) has not been drawn in question. The issue involved and argued here is whether this defendant, a Choctaw citizen of Mississippi, can be prosecuted in state court for the crime of aggravated assault (Miss. Code Ann. §97-3-7(2) (Supp. 1977)), or whether, because the crime was committed on federal trust property, he

must be prosecuted in federal court. (18 U.S.C. §§1153, 113(a)). The court below held Mississippi has no Indian Country, and criminal jurisdiction is with the state. That decision in regard to jurisdiction was not grounded on the state statute, but rather on the view of the property involved. The statute was too tangentially involved to satisfy 28 U.S.C. §1257(2). *Vale* v. *Louisiana*, 399 U.S. 30 (1970); *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Dana* v. *Dana*, 250 U.S. 220 (1918).

Appellee also denies that jurisdiction lies under 28 U.S.C. §1257(1). To appellant's original contention that the court below held invalid two Acts of Congress, he now adds three other Acts of Congress, and appellee responds that the five cited federal statutes were not held unconstitutional as applied. The court below did not deny the power of Congress to pass such statutes. *Miller* v. *Cornwall R. Co.*, 168 U.S. 131 (1897); *Baltimore and Potomac R. Co.* v. *Hopkins*, 130 U.S. 210 (1889). The validity of a federal statute is not drawn in question every time rights claimed under the statute are contested. *Kennard* v. *Nebraska*, 186 U.S. 304 (1902); *County of Cook* v. *Calumet and Chicago Canal and Dock Co.*, 135 U.S. 635 (1890). At issue in this case is the scope of the cited federal statutes as they pertain to the Choctaw Indians living in Mississippi. Those statutory purposes were construed by the court below, and as appellee will argue, such Indians were properly found outside their scope. Jurisdiction under 28 U.S.C. §1257(1) does not lie where the State decision turned on a construction of the statute or a finding that a set of facts do not bring federal statutes into operation. *Ivanhoe Irrig. Dist.* v. *McCrackin*, 357 U.S. 275 (1958); *Crary* v. *Devlin*, 154 U.S. 619 (1876). Certainly, the Act of June 21, 1939, 53 Stat. 851, not mentioned in the opinion below, was not held invalid. As will be

shown by historical review of these Indians, this Act was only to clarify the status of land previously purchased by the United States government; it did not have the purpose which appellant argues that it did. The opinion below quotes from *United States* v. *State Tax Commission*, 535 F.2d 300 (5th Cir. 1976), as follows [535 F.2d at 306]:

> (4) Nothing in the various Congressional enactments indicates a desire or purpose to abrogate the Dancing Rabbit Treaty;
>
> (5) Nothing in the various Congressional enactments indicates a desire or purpose to oust Mississippi of its jurisdiction over those who had been its citizens, so declared by the Treaty, for over a hundred years.

B. Preliminary Statement.

John's brief, at page 15, states: "Federal supervision over the Mississippi Choctaws was reestablished in stages between 1918-1945." The Government's brief likewise refers to "power to reassert federal dominion over Indians previously released from the guardian-ward relationship." It is the intent of this argument in reply to illustrate the invalidity of this reestablishment of federal supervision over certain Mississippians and the consequential error of John (and the Government) with respect to the attendant question of jurisdiction.

I. Federal Indian Law Is Dependent on Tribal Considerations.

Indian tribes are unique aggregations and must be viewed as such both historically and legally. The Constitution mandates that federal Indian law be *tribal* and not *racial* in concept and execution.

Nathan R. Margold, Solicitor, Department of the Interior, in his July 3, 1940, introduction to Felix S. Cohen's Handbook of Federal Indian Law, pointed out that ". . . the existence of federal Indian law can be neither justified nor understood except in terms of the existence of Indian tribes." He also wrote: "Federal Indian law is a subject that cannot be understood if the historical dimension of existing law is ignored." Both statements are relevant to these consolidated cases.

Article I, §8, cl. 3, of the United States Constitution provides Congress with power to "regulate Commerce . . . with the Indian Tribes." This, together with provisions of the fifth, fourteenth, and fifteenth amendments, caused Margold to comment: ". . . a body of federal Indian law, considered as 'racial law,' would be as much an anomaly as a body of federal law for persons of Teutonic descent. . ."

Two recent cases affirm the necessity of tribal considerations: *United States* v. *Antelope*, 430 U.S. 641 (1977) and *Morton* v. *Mancari*, 417 U.S. 535 (1974). In the former it was said 430 U.S. at 645):

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based on impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

If federal Indian law is grounded in tribal considerations, it follows that there must be a tribe in existence to be the subject or object of such consideration. And the tribe must be a lawful or valid tribe. As stated in *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913):

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the Courts.

By the terms of the Treaty of Dancing Rabbit Creek, the Choctaw Tribe, as a *tribe*, ceded to the United States the entire area possessed by the tribe in Mississippi and agreed to remove to western territory beyond the Mississippi River. Treaty of September 27, 1830 (7 Stat. 333); *Winton* v. *Amos*, 255 U.S. 373 (1920). This treaty was ratified by the United States Senate in February, 1831. Since that date there has not been a lawful or valid tribe of Indians in the State of Mississippi. Congress ratified the Treaty of Dancing Rabbit Creek and, since the date of that ratification, has not acted to create or reestablish a tribe, reservation or wardship relation with the Choctaws of Mississippi.

II. The Treaty of Dancing Rabbit Creek Ended the Tribal Character of Mississippi Choctaws.

Article VI, cl. 2, of the United States Constitution states that ". . . Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land. . ." Prior to the Indian Appropriation Act of March 3, 1871, 16 Stat. 544, 566, treaties were recognized and accepted as a method of agreement between the United States and the various Indian tribes. *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Peters) 1 (1831); *Worcester* v. *Georgia*, 31 U.S. (6 Peters) 515 (1832).

The Act of March 3, 1871, 16 Stat. 544, 566, terminating the treaty-making practice, recognized the validity and obligations of early treaties; it stated:

> That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided, further, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

The Treaty of Dancing Rabbit Creek, ratified some forty years prior to the Act of March 3, 1871, is fundamental to the consolidated cases before the Court; a closer look at its history and provisions is warranted.

The Choctaw Tribe originally occupied land in what became the State of Mississippi (and portions of Alabama and Louisiana).[4] After the United States took over this area, national policy and local demands required a series of treaties with the tribe. Accordingly treaties were made: January 3, 1786, 7 Stat. 21, at Hopewell, in northwestern South Carolina, defining the boundaries of the Choctaw Nation North of the 31° of North Latitude, East of the Natchez District; December 7, 1801, 7 Stat. 66, at Fort Adams, permitting the conversion of the Natchez Trace into a federal road and ceding 2,245,720 acres; October 17, 1802, 7 Stat. 73, at Fort Confederation on the Tombigbee, marking the boundary from the Chickasawhay to the Tombigbee; August 31, 1803, 7 Stat. 80, at Ho-buckin-too-pa, ceding 1,000,000 acres; November 6, 1805, 7 Stat. 98, at

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4. Contrary to the Government's brief at page 5, it has not been shown that the land ceded in 1830 by the Choctaws is the same land now held in trust.

Mt. Dexter, ceding 4,374,244 acres; October 24, 1816, 7 Stat. 152, at St. Stephens, ceding land where Columbus, Mississippi, now stands; October 18, 1820, 7 Stat. 210, at Doak's Stand On the Natchez Trace (negotiated by General Andrew Jackson and Chief Pushmataha), exchanging 5,000,000 acres in Mississippi for lands between the Arkansas, the Red, and the Canadian Rivers; and January 20, 1825, 7 Stat. 234, at Washington, agreeing that all Indians living on the exchanged lands in Mississippi might remain if desired and receive acreage.

The Treaty of Dancing Rabbit Creek, 7 Stat. 333, ceded the last of the Choctaw Tribal lands in Mississippi, some 10,500,000 acres, and provided for the removal of the tribe to western territory.

[Unlike the later practice of addressing Indian resident questions in enabling acts permitting the admission of new states, neither the Act of March 1, 1817, 3 Stat. 348, enabling the people of the Mississippi Territory to prepare for statehood nor the resolution of December 10, 1817, 3 Stat. 472, admitting Mississippi as a state of the Union made mention of the Choctaws.]

The Treaty of Dancing Rabbit Creek followed both national and state policy and practice. In 1829 Mississippi extended legal process into that portion of the state occupied by the Choctaws (Act of February 4, 1829; Hutch. Code, Art. 13 at 135 (1848)) and by Act of January 19, 1830 (Hutch. Code, Art. 14 at 136 (1848)) abolished the government of the Choctaws, granted them full citizenship, extended the laws of the state over them, and abolished their office of Chief. Congress, by Act of May 28, 1830, 4 Stat. 411, the Indian Removal Bill, had expressed the settled purpose of the national government to locate the eastern Indian tribes on lands beyond the Mississippi.

The opening language of the treaty is of interest:

> Whereas the General Assembly of the State of Mississippi has extended the laws of said State to persons and property within the chartered limits of the same, and the President of the United States has said that he cannot protect the Choctaw people from the operation of these laws; Now therefore that the Choctaw may live under their own laws in peace with the United States and the State of Mississippi they have determined to sell their lands east of the Mississippi and have accordingly agreed to the following articles of treaty:

Recognizing the fact that many Choctaws preferred to remain in Mississippi, Article XIV of the Treaty provided:

> Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the Agent within six months from the ratification of this Treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land. . . If they reside upon said lands intending to become citizens of the States for five years after the ratification of this treaty, in that case a grant in fee simple shall issue; . . . Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity.[5]

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5. Am. State Papers, VII, Public Lands, 133 (1860) and VIII, Public Lands, 687 (1861) contain registers of Choctaws who expressed intention to become citizens of Mississippi and detailed letters by governmental personnel and others regarding these Choctaws.

In 1831, 1832, and 1833, the majority of the tribe moved west; some one-third (approximately 5,000) had initially elected to remain in Mississippi. Migration continued over the years and approximately 2,000 Choctaws remained in Mississippi in 1900.[6]

Appellants-Respondents John are presumably descendants of Choctaws who elected to remain in Mississippi. In any event, they are Mississippi Choctaws who must trace their connection to their ancestral tribe through the provisions of the Treaty of Dancing Rabbit Creek, a treaty ratified over a century ago and unmodified or changed since its ratification with respect to Mississippi Choctaws.

It has been held that Congress may supersede treaties with Indian *tribes*. *The Cherokee Tobacco,* 78 U.S. (11 Wall.) 616, 621 (1870); *Ward* v. *Race Horse,* 163 U.S. 504, 511 (1896); *Draper* v. *United States,* 164 U.S. 240, 243 (1896); *Thomas* v. *Gay,* 169 U.S. 264, 271 (1898); *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903); and *Ex Parte Webb,* 225 U.S. 663 (1912). But, to reiterate, *Congress has not chosen to do so with regard to* the Treaty of Dancing Rabbit Creek.

Commenting on this exact point in *United States* v. *State Tax Commission,* 541 F.2d 469 (5th Cir. 1976), the Court said (541 F.2d at 470-471):

> When Congress, in 1871, reaffirmed the validity of all prior Indian treaties, the Treaty of Dancing Rabbit had been on the books for forty years, and for nearly that long the Choctaw Indian Tribe had been removed to the Indian Territory. Those of Choctaw blood who chose to remain in Mississippi as citizens

6. Gibson, *The Indians of Mississippi,* in I A History of Mississippi 69 (R. A. McLemore ed. 1973); J. Claiborne, Mississippi As A Province, Territory and State (2d ed. 1964).

had for that long been emancipated from the control and protection of the United States, subject to all the obligations of state citizenship. As noted in our prior opinions in this case, the United States government took no notice of the Mississippi Choctaws until 1918, when, as a "gratuity", it extended financial relief, most of which was to have been repaid.

Leaving aside the factor of intervening state sovereignty over its citizens in matters left to the states under our federal system, the lengthy list of cases cited *supra* make it clear that the Dancing Rabbit Treaty may not be superseded by implication—see, particularly, *Ward* v. *Race Horse,* 163 U.S. at 511, 16 S.Ct. 1076.

The dispositive point is that throughout a period of 145 years the Congress has never passed an act specifying a purpose to supersede the Treaty of Dancing Rabbit or declaring that the State of Mississippi shall be deprived of the jurisdiction appropriately belonging to it. To the contrary, as pointed out in our previous opinions, especially in the legislative history appearing at 535 F.2d 306, Congress has repeatedly declined earnest solicitations that it take such action with reference to the Mississippi Choctaws.

The Treaty of Dancing Rabbit Creek ended the tribal character of Mississippi Choctaws and Congress has not superseded the provisions of that treaty, has enacted no legislation creating a tribe in Mississippi, establishing a reservation or purporting to reestablish a wardship relation between the United States and Mississippi's Choctaw citizens. As enunciated in *McCurdy* v. *United States,* 246 U.S. 263, 38 S.Ct. 289, 62 L.Ed. 706 (1918) [citing *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803): Governmental authority cannot rest upon a foundation built entirely of

sand; there must be some legislative cement therein. Congress has failed to provide the "legislative cement" necessary to hold together the arguments of the Department of Interior, the Government, and John with regard to the Mississippi Choctaws.

III. Mississippi Choctaws: Not a Tribe; Not Living on a Reservation; Not Wards of the United States Government.

A. Circa 1830.

At the time of the Treaty of Dancing Rabbit Creek, Mississippi Choctaw Indians were not untutored savages living in a state of warfare with their white neighbors. Indeed, for approximately 130 years they had lived in peace and harmony with the French, Spanish, English and Americans who settled in the area. (Pushmataha, a Choctaw chief, was made a lieutenant colonel in the army in 1813 after he had refused to join the Creek conspiracy; when he went to Washington in connection with the Treaty of Doak's Stand, he was honored by President Monroe.) By 1830, many Choctaws were people of property and means, as ready for civilization as the rough-hewn emigrants walking into the new state from the hills and mountains to the east.[7]

Consequently, many Choctaws elected to remain in Mississippi as citizens when the tribe removed to western Indian territory in accordance with the terms of the Treaty of Dancing Rabbit Creek. Certain articles of the Treaty provided specific allotments of land to certain individuals (e.g. Articles XV and XIX) and Article XIV provided for any other "Choctaw head of a family" to remain and become a citizen. Those who remained were fully eman-

7. J. Betterworth, Mississippi: a history (1959)

cipated from federal control. When tribal existence ceases, Indians cease to be under federal jurisdiction and become subject to state law. *Worcester* v. *Georgia*, 31 U.S. (6 Peters) 515, 580 (1832); *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 146 (1810).

B. 1830-1918.

In the years immediately following the Treaty of Dancing Rabbit Creek (1831-33), the federal government was interested primarily in the removal of the Choctaws to the western territory and with Choctaws claiming land allotments. The Mississippi Choctaws were then left to their own devices.

Greenwood Leflore, although admittedly atypical, is noteworthy as one of the Choctaws who remained in Mississippi. As noted in C. Rand, Men of Spine in Mississippi 129-130 (1914):

> Showing a keen capacity of leadership and a deep sympathy for his mother's people, he was chosen chief of the Choctaw Nation at the age of twenty-six and at thirty, by popular vote, was elected head chieftain of the tribe.
>
> * * *
>
> He cast his lot with the white man's economic system, and from a log cabin, with a federal grant of four sections of land and a small annuity, he arose to a position of great wealth and power.
>
> He grew cotton, accumulated land and money until his plantation in the fertile valley of the Mississippi alone comprised 15,000 acres. He owned slaves and built a plantation palace, Malmaison, the Louis XIV furniture for one room costing $10,000.00. Here he entertained with all the traditional hospitality of the

Old South. In addition to his Mississippi holdings, he held part interest in 60,000 acres in Texas.

Dissatisfied with the way his cotton was handled on the Yazoo River, he established a town of his own, Point LeFlore, and constructed a $75,000.00 turnpike to attract business to his trading center. He ran a store, built a sawmill and operated a steamboat.

He served in the state senate from 1841 to 1844 and became a political as well as financial factor in Mississippi.

But with the exception of the relatively short antebellum period (1830-1860), Mississippi and all of its citizens (whether of European, Indian or African ancestry) suffered through war, reconstruction and depression. From a position as a relatively rich state, Mississippi became one of the poorest states in the Union. From time to time, the Mississippi Choctaws rejoined their brethern in the west and became thereby citizens of the Choctaw Nation.[8]

The authority on Choctaw history, Angie Debo, *supra*, n. 8, p. 181 has written:

> Although the Choctaws were not willing to grant citizenship to all persons who could claim remote descent from a Choctaw ancestor, they welcomed the immigration of such of their own people as had remained in Mississippi. . . . the [Choctaw] Council memorialized Congress to appropriate money for their removal. Although Congress failed to act, a large number were persuaded to come during 1890. Numerous acts of the Council granted citizenship to these new arrivals, often designated as fullbloods, and money was frequently appropriated to support them until

8. A. Debo, The Rise and Fall of the Choctaw Republic 180 (2d ed. 1961)

> they should be able to raise a crop. In 1891 the Council appropriated $1,792.50 to pay the expenses of removal and provided for the appointment of two commissioners to go to Mississippi "to collect up the Choctaws and bring them to this Nation." . . . As late as 1895 frequent grants of citizenship and money were made to fresh recruits from Mississippi and Louisiana.

By Act of March 3, 1893, 27 Stat. 612, 645, Congress began a policy of terminating the tribal existence of the Five Civilized Tribes (the Choctaws, Cherokees, Chickasaws, Creek and Seminoles) in western Indian Territory. The Dawes Commission, appointed under the provisions of the Act of March 3, 1893, was given the work of closing out the tribal estate and terminating the tribal government. The Act of June 10, 1896, 29 Stat. 321, 339-340, directed the Commission to prepare rolls of the tribes. As described by Debo, *supra*, n. 8, at 273-4:

> During the enrollment period many applications were presented by people claiming to have Choctaw blood, who had lived outside the Nation and had never been recognized as citizens. The Dawes Commission uniformly decided against these claimants, and Judge Clayton also ruled that since the object of the removal treaties had been to limit the Choctaws to a certain area, and since the title to their lands was to exist only so long as they should live there, Choctaw blood did not of itself confer citizenship. . . .
>
> An exception was made in the case of the Mississippi Choctaws, since the Treaty of Dancing Rabbit Creek, which had given the Choctaws the option of taking allotments in Mississippi, had further provided that "Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever

remove are not to be entitled to any portion of the Choctaw annuity." It will be remembered, moreover, that during the entire course of their national life in the West the Choctaws had encouraged the immigration of their people from Mississippi and had freely admitted them to citizenship.

An act of June 7, 1897, made it the duty of the Dawes Commission to report to Congress whether or not the Mississippi Choctaws were entitled to citizenship privileges. The Commission then made an investigation and reported that to be eligible for enrollment it would be necessary for such Indians to take up a bona fide residence in the Choctaw Nation and establish their identity as the descendants of those who had elected to take allotments under the treaty of Dancing Rabbit Creek. The Curtis Act then made it the duty of the Commission to identify them.

* * *

> . . . In April of 1901, representatives of the Commission went to Mississippi, where they spent more than a year trying to identify all the fullbloods of that region. . . .
>
> In 1903 Congress made an appropriation to aid these fullbloods in removal, and before the year was over about three hundred were brought by train, and assisted to settle in the Choctaw country. . . .

As to the Choctaws who remained in Mississippi, it appears that no special Congressional legislation was addressed to them or their status. No federal statutes or cases can be located which treat them as a distinct tribe; all recognition given them until the termination of the Choctaw Nation in 1906 was as separated brethern of the tribe in the west. Since 1830, the United States govern-

ment had regarded the Mississippi Choctaws as emancipated; it conferred no tribal status on them and provided for them no reservation.

In 1920, this Court in *Winton* v. *Amos*, 255 U.S. 373 (1920) summarized the status of the Mississippi Choctaws during the 1830-1918 period (255 U.S. at 378):

> . . . Choctaws who remained in Mississippi under that article adopted the dress, habits, customs, and manner of living of the white citizens of the State. They had no tribal or band organization or laws of their own, but were subject to the laws of the State. They did not live upon any reservation, nor did the Government exercise supervision or control over them. No funds were appropriated for their support, though much land was given to them. Neither the Indian Office nor the Department of the Interior assumed or exercised jurisdiction over them, and they never recognized them either individually or as bands, but regarded them as citizens of the State of Mississippi, and the Department held it had no authority to approve contracts made with them.

Efforts to obtain federal relief for Mississippi Choctaws proved futile until 1918.

C. 1918-1931: Relief Measures.

In 1908, the Commission of Indian Affairs sent an agent to Philadelphia, Mississippi, to investigate the conditions of the Choctaws in that area. T. Bounds, Children of Nanih Waiya 53 (1964). A decade later, Congress provided for their relief via an appropriations bill for the Bureau of Indian Affairs. Under the heading, "MISSISSIPPI" the Act of May 25, 1918, 40 Stat. 561. 573, provided:

For the relief of distress among the full-blood Choctaw Indians of Mississippi, including the pay of one special agent, who shall be a physician, one farmer, and one field matron, $5,000.00; for their education by establishing and maintaining day schools including the purchase of lands and the construction of necessary buildings, $20,000.00; and for the purchase of lands, including improvements thereon, not exceeding eighty acres for any one family, for the use and occupancy of said Indians, *to be expended under conditions to be prescribed by the Secretary of the Interior for repayment to the United States under such rules and regulations as he may direct, $25,000.00;* for the purpose of encouraging industry and self-support among said Indians and to aid them in building homes, in the culture of fruits, grains, cotton and other crops, $25,000.00, which sum may be used for the purchase of seed, animals, machinery, tools, implements, and other equipment necessary in the discretion of the Secretary of the Interior, to enable said Indians to become self-supporting, *to be expended under conditions to be prescribed by the said Secretary for its repayment to the United States on or before June Thirtieth, Nineteen Hundred and Twenty-Five;* in all, $75,000.00 to be immediately available. (Emphasis added)

Bounds, *supra*, p. 53, states:

> A special agent was sent to Philadelphia, Mississippi in 1918, and he found that the Choctaws did not attend school and were generally leading an isolated life. The great majority of the Indians were living in Neshoba, Leake, Newton, Scott, Jones, Winston and Noxubee Counties. The poor health, education and economic status of the people led to the establishment of an agency at Philadelphia in 1918.

Obviously the Act of May 25, 1918 was a relief measure. It neither refers to the Choctaws of Mississippi as a tribe nor makes any mention of a reservation. Its language indicates that it was intended to provide land for families or on an individual basis, not in community or in common. Further it provided for repayment to the United States. The Commissioner of the Bureau of Indian Affairs had formally reported to Congress that the Mississippi Choctaws did not live on a reservation, and he declined to recommend that Congress create one. 56 Cong. Rec. 1138 (1918).

Bounds, *supra*, pp. 55-62, comments:

> The land purchase program was initiated in 1921. Under this program, the government bought a tract of land, sub-divided it into twenty to forty acre plots, and built a small house on each plot. The land was resold to the Indians on a reimbursable basis. . . . From 1921 until 1932, the Government bought 3,680 acres of land for the Choctaws. It was sold to 88 Indians on the reimbursable Plan. All of them defaulted in payment.

If the 1918 appropriation failed in its purpose, it nevertheless provided an entree for the Department of Interior with respect to attempting to gain control over some, if not all, of the Mississippi Choctaws. (See Appendix to *United States* v. *State Tax Commission*, 535 F.2d 300 (5th Cir. 1976), attached as Appendix to this brief, for a discussion of the Legislative History of the Act of May 25, 1918.)

D. 1930's-1940's: Growing Federal Control.

The argument for exclusive federal jurisdiction over Mississippi's Choctaws, as expounded by John and the

Government, seems to rest on three legs: (1) The Indian Reorganization Act (Act of June 18, 1934, 48 Stat. 784, also known as the Wheeler-Howard Act); (2) The Act of June 21, 1939, 53 Stat. 851, defining the status of lands purchased for the Choctaws of Mississippi; and (3) a Proclamation dated December 4, 1944, by the Department of Interior proclaiming a reservation and tribal status for Mississippi Choctaws. As will be shown below, the Indian Reorganization Act had and has no applicability to Mississippi Choctaws, the 1939 enactment could not do more than its stated purpose, and the Proclamation was invalid and ineffective to oust Mississippi's jurisdiction over certain of its citizens.

(1) The Indian Reorganization Act.

As indicated above, the Choctaws who remained in Mississippi after the Treaty of Dancing Rabbit Creek did so as individuals; they were not obligated to live in any one place and consequently moved as individuals to various areas of the state and beyond its borders. Some rejoined the tribe in Indian Territory. As noted in *Winton* v. *Amos, supra,* "They had no tribal or band organization or laws of their own . . . They did not live upon any reservation, nor did the Government exercise supervision or control over them." Even the Act of May 25, 1918 providing "For the relief of distress among the full-blood Choctaw Indians of Mississippi" did not indicate where these "full-blood Choctaw Indians" were located nor exactly how it was to be determined which were "full-blood." Since the Choctaw Manpower and Demographic Survey [filed with the Clerk; see n. 7 at Page 8 of the Mississippi Band of Choctaw Indians as Amicus Curiae] notes that Choctaws presently live in most of Mississippi's [82] counties and in Western Tennessee it is not unreasonable

to assume that they ranged rather widely over Mississippi in the 1920's and 1930's.[9]

Professor Peterson, an authority cited by John, in his dissertation (*The Mississippi Band of Choctaw Indians: Their Recent History and Current Social Relations,* U. of Georgia Ph.D. Thesis, 1970) notes (at page 34):

> Even today, one finds a few isolated examples of such groupings in the Machulaville area of Noxubee County northwest of Philadelphia, where Choctaws have avoided contact with the Choctaw Agency.

At page 78 he notes the efforts of Catholic missionaries to bring the Choctaws into a community in the late 1880's and 1890's and comments:

> It is noteworthy that this effort occurred . . . twenty years before the Federal Government became interested in the conditions of the Mississippi Choctaws, and thirty-six years before the Federal Government began following the same general policy of land purchases. . ."

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9. Peterson's dissertation contains in its Appendix a map titled, "Location of Choctaw Population in Mississippi, 1960." It indicates a population estimated at between 2,994 and 3,362 living in 58 of Mississippi's 82 counties. Seven counties are designated "Choctaw Agency Service Area" and have Choctaw populations of 1,212; 519; 384; 235; 115; 45; and 38. The remaining 51 counties have Choctaw populations estimated at: 34 counties, 1-9; 6 counties, 21-29; 4 counties, 10; 2 counties, 51-59; 2 counties, 11-19; and one county (each) with 31-39, 41-49, 50, and 115. Peterson comments, at page 147: "As late as 1962 only 32 percent of Choctaw households had automobiles and only 11 percent had trucks. As a result, Choctaws in different communities were isolated from each other." This geographical diversity of Mississippi Choctaws and attendant communication difficulties as noted in the 1960-62 period raises serious question about the difficulty of locating and serving "full-blood" Choctaws under the 1918 relief measure and applying provisions of the 1934 Indian Reorganization Act to the group reelections requiring a majority of the tribe, etc.

And, at pages 139-140:

> The creation of the Choctaw Agency in 1918 provided a non-Choctaw leadership structure for coordinating and directing the various programs for the Choctaw people. However, it was not until 1935 that a recognized body of spokesmen for the Mississippi Choctaws was formed as a result of an affirmative vote by the Choctaw people as provided under the terms of the Indian Reorganization Act of 1934. The Business Committee was approved and sponsored by the Agency, but confusion resulted when an opposing faction of Choctaws formed the Mississippi Choctaw Indian Federation to protest the formation of the Business Committee. The Choctaw Business Committee, however, continued as the recognized tribal government although in actuality, it had little or nothing to govern.

Also:

> Since its organization in 1945, the Tribal Council has had no voice in the management of any programs of the BIA, and its own programs have been almost non-existent.

Bounds, *supra,* has written:

> After the treaty of Dancing Rabbit Creek, there was no tribal government until the organization of the Choctaw Business Committee in 1934. This committee was composed of seventeen members selected from the seven communities, four communities selecting only two members each. In September that year the committee met and elected officers.
>
> An opposing faction organized the Mississippi Choctaw Indian Federation, which was not recognized or approved by the Indian Bureau.

Thus, it would appear, that the Department of Interior, utilizing the agency set up to handle the 1918 relief funds, put together some semblance of an organization among such Choctaws as it could find near its Philadelphia, Mississippi office. As to other Mississippi Choctaws in other sections of the state, the record appears silent.

With this background in focus, attention can now be directed more explicitly at the purpose and language of the Indian Reorganization Act.

In *Tribal Self-Government and the Indian Reorganization Act of 1934,* 70 Michigan L. Rev. 955 (1972), it states [at 961-962]:

> The Wheeler-Howard Bill, as the originally proposed legislation was known, was entitled an act "[t]o grant to Indians living under Federal tutelage the freedom to organize for purposes of local self government and economic enterprise." The bill represented a significant change in the approach to Indian legislation. Although the original Wheeler-Howard Bill was greatly restructured in the final version that became the IRA, some knowledge of its provisions is useful.
>
> Title I of the Wheeler-Howard Bill, "Indian Self-Government", was the heart of the proposed legislation. In it were set forth the broad principles of self-government and the specific policy goal that "those functions of government now exercised over Indian reservations by the Federal Government through the Department of Interior and the Office of Indian Affairs shall be gradually relinquished and transferred to the Indians of such reservations. . . ."

Another article, written closer in time to the passage of the Indian Reorganization Act, Krieger, *Principles of*

the Indian Law and the Act of June 18, 1934, 3 Geo. Wash. L. Rev. 279 (1935) notes [at 296]:

> The portion of those Indians who are not inclined to give up their tribal allegiance remains considerable and renders the execution of the original policy of incorporating all Indians into the general legal system impossible.
>
> Grave and long disregarded inconveniences in the relations between the Federal Government and the Indian tribes made decisive action necessary. Thus the Wheeler-Howard Bill came into existence, preceded by proper negotiations between the present administration of the Indian Bureau and the Committees of Indian Affairs of the Senate as well as the House of Representatives.

And, as reported by Felix S. Cohen, *supra*, page 84:

> More briefly the objectives of the legislation are summed up in the report presented by Senator Wheeler, one of the co-sponsors of the measure, on behalf of the Committee on Indian Affairs, of which he was chairman. The report recommending enactment of the measure [Sen. Reprt. No. 1080, 73d Cong., 2d sess. (May 10 (calendar day, May 22), 1934)] declared:
>
> > The purposes of the bill, briefly stated, are as follows:
> >
> > (1) To stop the alienation, through action by the Government or the Indian, of such lands, belonging to ward Indians, as are needed for the present and future support of these Indians.
> >
> > (2) To provide for the acquisition, through purchase, of land for Indians, now landless, who

> > are anxious and fitted to make a living on such land.
> >
> > (3) To stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations.
> >
> > (4) To permit Indian tribes to equip themselves with the devices of modern business organization, through forming themselves into business corporations.
> >
> > (5) To establish a system of financial credit for Indians.
> >
> > (6) To supply Indians with means for collegiate and technical training in the best schools.
> >
> > (7) To open the way for qualified Indians to hold positions in the Federal Indian Service.

Cohen also cautions,

> The first eight sections of the law as finally enacted correspond to the provisions of the bills considered and reported by the House and Senate Committees. In the remaining sections of the measure as finally enacted, various combinations and compromises were made between two different drafts which passed the two houses and, therefore, the House and Senate debates and committee reports must be read with caution.

And, at page 85:

> Sections 16 and 17 deal with the problem of tribal organization and tribal incorporation. Since these sections were the work of a conference committee, which

took phrases from the bill that had passed the House and other phrases from the bill that had passed the Senate, the House and Senate committee reports and legislative history prior to the conference report must be used with extreme circumspection, in aiding the interpretation of these two sections. . . .

It appears from the above that the chief thrust and intent of the Indian Reorganization Act was directed at "Indians living under Federal tutelage" and "Indians who are not inclined to give up their tribal allegiance" and further to "To stop the alienation (of Indian) lands" and "To stabilize the tribal organization of Indian tribes."

As has been previously shown, at that time, Mississippi Choctaws were not living under Federal tutelage, had no tribal organization and were *given* land under the terms of Article XIV of the Treaty of Dancing Rabbit Creek and *sold* land under the provisions of the government's relief act of 1918. [It is interesting to note that Cohen, *supra* at page 273 writes: "It has been administratively determined that those Choctaws remaining in Mississippi when the Choctaw Tribe removed to Indian Territory lost their tribal status and could not be recognized as a separate tribe." Memo, Sol. I.D., August 31, 1936.]

If the purpose of the Act was in any way directed to the Mississippi Choctaws, the language of the Act conceals it. Note especially the language of Section 16:

> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election

> authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. . . .

As has been previously indicated, there was no Indian tribe in Mississippi at the time and no Indian reservation. It is impossible to speculate on what might constitute a "majority" of the "tribe" because of the geographic diversity of the Choctaws and attendant communication difficulties.[10]

It is argued, however, that the Indian Reorganization Act could be made applicable to Mississippi Choctaws in that in Section 19 the term "Indian" is defined. Cohen, *supra*, writes at page 5:

> A recent statutory definition of an Indian is that contained in the Indian Reorganization Act, which in section 19 provides:
>
> > The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.
>
> For the purposes of this Act, Eskimos and other aboriginal people of Alaska shall be considered Indians.
>
> In this act as in the foregoing acts, the definition of "Indian" is limited in its connotation to the purposes of the legislation.

---

10. Contrast with the Department of Interior's extensive anthropological research in *Maynor* v. *Morton*, 510 F.2d 1254 (D.C. Cir. 1975).

Ignoring the possible conflict between the provisions of the relief act of 1918 for "full-blood" Indians and the Indian Reorganization Act's provisions for "persons of one-half or more Indian blood", it is submitted that the Indian Reorganization Act in neither purpose or intent was or is directed to the Mississippi Choctaws. (*Arguendo*, if the phrase "and shall further include all other persons of one-half or more Indian blood" is determinative, there would be no need for the two previous definitions of "Indian" since this phrase alone would be sufficient.)

[It is of interest to note that Section 13 of the Act exempted the Choctaw Tribe in Oklahoma, yet this same Act is cited as the vehicle which created tribal life for the non-tribal Choctaws of Mississippi.]

(2) Act of June 21, 1939, c. 235, 53 Stat. 851.

John's brief (pages 30-31) argues:

> The 1939 Choctaw statute was passed at the request of the Interior Department, and its purposes were stated in the House Report:
>
> *Specific effect of the bill if enacted*—It will place all those lands purchased under the authority of the various resale acts in the same status as the lands being purchased under the authority of section 5 of the Indian Reorganization Act for the Mississippi Choctaws.
>
> *Advantages*—It will avoid many administrative problems which will arise otherwise; will insure a more productive use of the lands; and will facilitate matters greatly if the Indians should choose to organize under section 16 of the Indian Reorganization Act, and take over administration of their lands.

> Thus Congress in 1939, only five years after the I.R.A. expressly recognized that the Mississippi Choctaws are within that Act.

With all deference to John, it is respectfully suggested that the recognition was more on the part of the Interior Department than of Congress. The Interior Department had been struggling for years with the peculiar problem of lands for the Choctaws in Mississippi. As noted by Peterson:

> (Pages 119-120) While the purchase of farms for individual Choctaws did accomplish some success in concentrating the Choctaw population and improving the living condition of individual Choctaw families, it was almost a total failure in its expressed aim of establishing the Choctaws as rural land owners. Two thousand five hundred and forty-nine reimbursable loans covering purchase of farms and supplying of equipment and supplies were made to a total of 479 Choctaws. Of these almost 80 percent were delinquent and unpaid in 1946.
>
> (Pages 123-125) The defaulting of most farm loans forced a reevaluation of the land purchase program. On June 21, 1939, a Congressional Act provided that titles to lands purchased with reimbursable funds upon which payments were defaulted were to become trust lands held by the United States Government for the Choctaw Indians living in Mississippi, who were at least one-half Choctaw blood. (Statutes at Large of the United States, LV, Part 11:851). Under this Act, during 1940 and 1941 the majority of land purchased under the reimbursable loans for supplies and equipment were not immediately cancelled, but remained largely uncollectable.

Meanwhile, in 1937, the Agency began purchasing additional lands under the Indian Reorganization Act of 1934. A total of almost 12,500 acres were purchased for trust land under this program, with all but one thousand being acquired before 1944. This land, plus the approximately four thousand acres purchased originally under the reimbursable plan with reimbursable funds, brought the total lands to approximately 16,500 acres.

Much of this additional land was unsuited for agriculture, but as late as the early 1940's, the Choctaw Agency was attempting to clear some of this newly purchased land and establish additional forty acre farms in the Pearl River community. This continuing emphasis on agricultural development by the Choctaw Agency was in accord with the general direction of the Bureau of Indian Affairs policies . . . This agrarian policy was promoted even for tribal groups who were far less involved in agriculture than were the Choctaws.

> (Page 125-126) In the case of the land purchase program, however, the Choctaws, by and large, did not conform to government expectations that they would purchase farm land, and as a result, the government ended up placing the land in trust for the Choctaws even though they did not purchase it.

Probably the last sentence quoted above states the real point of the Act of 1939: The Department of Interior had purchased land for the Choctaws, seen its land program come to conflicts with *its* expectations for the Choctaws and, instead of retreating, bought more land to hold.

In any event, the language of the Act hardly supports the arguments made for its vitality and purpose:

> AN ACT To define the status of certain land purchased for the Choctaw Indians, Mississippi.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That title to all lands purchased by the United States for the benefit of the Choctaw Indians of Mississippi, under authority contained in the Act of May 25, 1918 (40 Stat. L., 573), and similar subsequent Acts, not under contract for resale to Choctaw Indians, or on which existing contracts for resale may hereafter be canceled, is hereby declared to be in the United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior.

Again, no reference to a tribe or a reservation is included in this legislation. It is simply an act to define the status of certain land purchased for the Choctaws of Mississippi, nothing more.

John's brief raised curious questions as to chronology concerning the Choctaws of Mississippi and the Interior Department's agents. At page 12 of his brief we are told, with regard to the Indian Reorganization Act:

> On March 30, 1935, the Act was voted on by the Mississippi Choctaws and they accepted it.

Yet we note in the brief, at pages 30-31, the quotation from the House Report giving the supposed advantages of the 1939 Act which says:

> . . . and will facilitate matters greatly if the Indians should choose to organize under section 16 of the Indian Reorganization Act.

And Peterson states that in 1937 lands had been purchased under the Indian Reorganization Act. Apparently use of the Indian Reorganization Act with regard to Mississippi Choctaws was something of an elective or selective thing during the 1930's.

(3) Proclamation of December 4, 1944.

Under date of December 4, 1944, Oscar L. Chapman, Assistant Secretary of the Department of Interior, issued a proclamation declaring the lands purchased in Mississippi to be an Indian reservation. (In the proclamation he also made reference to "the recognized tribal authorities of the Mississippi Band of Choctaw Indians." A copy of the proclamation is attached as an appendix to the opinion given in *United States* v. *John* by the United States Fifth Circuit Court of Appeals.) The proclamation attached, as Exhibit A, a legal discription of the lands covered by the proclamation.

There is no indication in these consolidated cases as to the rationale behind the land purchases made by the Department of Interior, although the list appended to the proclamation presents a curious configuration for any type of "reservation." It lists the following counties and acreage:

Attala	40
Jones	320
Leake	1,721 6/7
Neshoba	10,232.6
Newton	767
Kemper	223
Scott	110

Although the tracts purchased were neither continuous nor contiguous, six of the seven counties were/are contiguous, Jones being removed from the others by intervening Jasper county. [Only five of these counties are listed in the Choctaw Agency Service Area given by Peterson, *supra*, in his appendix; apparently Attala and Scott counties are not now served but an additional two, Winston and Noxubee are.] The tracts appear to range in size from three to 640 acres in size.

The indictment of John alleged that the offense took place "in the NE 1/4 of Section 35, Township 11 N Range 7 E" in Leake County, Mississippi. *Arguendo*, if the proclamation were effective to create a *reservation*, the land encompassed would do severe violence to the ends sought to be achieved through the enactment of 18 U.S.C. §1151, see *Seymour* v. *Superintendent*, 368 U.S. 351 (1962).

But the proclamation was grounded in the Indian Reorganization Act and therefore was a nullity insofar as being determinative of the issue of federal-state jurisdiction in these consolidated cases. As has been previously shown, the Indian Reorganization Act could not and did not pertain to Mississippi Choctaws and the 1939 land status act was nothing more than a definition of title. The proclamation could not and did not transform an administrative agency's problems into a Congressional enactment creating a tribe, a reservation, or a wardship status for Mississippi Choctaws.

E. Mississippi Choctaws Today.

Although more interested in anthropological study than in legal consideration, Peterson, *supra*, provides valuable background information for appropriate study of the cases now under consideration. He writes (pages 6-7):

. . . After Choctaw removal, the sand clay hills region was gradually transformed into a region of small subsistence farms, few of which were large enough to permit slave holding. The major roads of white civilization avoided the region, and absence of large cash crops gave little cause for major roads connecting the region with other parts of Mississippi. The region was far from completely isolated, but it was definitely a bypassed area. Generations of white, Negroes, and Choctaws lived out their lives largely unnoticed by the rest of Mississippi or the nation.

The remaining Choctaws shared the fate of other people in the sand clay hills. As an agricultural people, they adapted to the white settlement first by remaining squatters on marginal land and later by becoming sharecroppers, as did most Negroes and some whites following the Civil War. Living on scattered isolated farms, there was little in Choctaw culture to excite the curiosity of the tourist. Even "native" Mississippians outside the sand clay hills are often surprised to learn that one of the largest Indian groups in the Southeast resides in their state.

And (at page 109):

> The Choctaws, Mississippi whites, and the Bureau of Indian Affairs all claim some credit for the establishment of the Choctaw Agency. . . . Older Choctaws . . . state that the Choctaw leaders took their complaint to the governor of Mississippi and to Senator Vardaman, and as a result, the Senators and Representatives from Mississippi became active in promoting the claims of Mississippi Choctaws. When they were unsuccessful in attempting to prevent the Oklahoma Choctaw rolls being closed against the Mississippi Choctaws (Report of the Commissioner of Indian Affairs, 1918:84), they became the active supporters of a bill *to provide services* to the Choctaws in Mississippi. Editorial support from Mississippi newspapers also helped bring attention to the *needs* of the Choctaws (Rand, 1940:143). (Emphasis added).

Angus McEachran, writing of Mississippi Choctaws in a feature of the Memphis, Tennessee *Commercial-Appeal*, March 18, 1973, §1, at 1 commented:

> . . . Indeed, as a recent survey indicated, most Indians do not acknowledge any kind of problem. This despite the fact that 68 percent live on income under the national poverty level, one-third are unemployed and one-third are underemployed.
>
> Maybe they would have been more candid had the survey about Indians been taken by Indians. That is a great part of the problem. The Indians are tired of the white man doing for them. Their suspicions run deep. They want to do for themselves.

But, it is argued by the Government, Mississippi Choctaws are a "Dependent Indian Community" and therefore (at page 24):

> . . . there is no legal significance in the fact that the Mississippi Choctaws had an intervening period of independence which regrettably served only to demonstrate their need for continued protection by the United States.

Thus the picture comes into focus. The position of Appellants-Respondents and Petitioners apparently is that relief measures alone are not enough (via Congress' 1918 Act) but full dependence (on the Bureau of Indian Affairs) is necessary and must be continued. If this is indeed accurate and proper, Congress has not yet provided for it and, absent Congressional enactments, the facts re-

main that the Mississippi Choctaws today are not a lawful and valid tribe, are not wards of the Government, and do not inhabit a valid and lawful reservation.

IV. The Consolidated Cases Before the Court Must Be Affirmed.

The nexus of the cases consolidated and now before the Court is that both hold that state, not federal jurisdiction, obtains with regard to criminal charges against Mississippi Choctaws. If the federal court had competent jurisdiction, jeopardy attached, the Major Crimes Act giving exclusive jurisdiction to federal courts for those crimes committed by Indians in Indian country. However, the federal courts in Mississippi had no jurisdiction, there being no Indian country in Mississippi. Jeopardy does not exist from conviction or acquittal in a court lacking competent jurisdiction. *Diaz* v. *United States*, 223 U.S. 442 (1912); *McCleary* v. *Hudspeth*, 124 F.2d 445 (10th Cir. 1941), *cert. den.* 316 U.S. 670 (1942).

The argument of Appellants-Respondents and Petitioners on jurisdiction is that 18 U.S.C. §1153 covers offenses committed within Indian country, that 18 U.S.C. §1151 defines Indian country and that the land purchased by the United States in Mississippi and held in trust for the Mississippi Choctaws is "Indian country." Section 1151 states that "the term 'Indian country' . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . (b) all dependent Indian communities . . ."

The argument of Appellants-Respondents and Petitioners on jurisdiction is that 18 U.S.C. §1153 covers offenses committed within Indian country, that 18 U.S.C. §1151 defines Indian country and that the land purchased by the United States in Mississippi and held in trust for

the Mississippi Choctaws is "Indian country." Section 1151 states that "the term 'Indian country' . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . (b) all dependent Indian communities . . ."

But, Mississippi has had jurisdiction over the land in question since at least 1831. The record is absolutely devoid of any indication of Mississippi agreeing to any termination of this jurisdiction, (Public Law 280, 67 Stat. 588 (1953), was inapplicable to Mississippi because the state already had the jurisdiction offered via this act.)[11]

Further the record is absolutely devoid of any specific congressional act attempting to recreate a tribe of Indians in Mississippi from those citizens who chose to remain in the state following the Choctaw Tribe's removal after the Treaty of Dancing Rabbit Creek. The record is also devoid of any Congressional enactment mentioning a wardship status for Mississippi Choctaws. The record is devoid of any Congressional enactment creating a reservation in Mississippi.

Opposing briefs herein argue after-the-facts justification. Mississippi merely urges a logical and rational view of the historical realities and the attendant legal consequences. Government and John repeatedly cite *United States* v. *McGowan*, 302 U.S. 535 (1938); however, it must be noted that the Court states [at page 539]:

> The Federal prohibition against taking intoxicants into this Indian colony does not deprive the

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11. There is absolutely no evidence of Congressional enactments, State of Mississippi legislation or otherwise that the State of Mississippi was requested to or ceded jurisdiction over the subject lands to the United States government. The lands in question, presumably, were purchased from private parties over the years without the knowledge or consent of the State of Mississippi.

> State of Nevada of its sovereignty over the area in question. The Federal Government does not assert exclusive jurisdiction within the colony. Enactments of the Federal Government passed to protect and guard its Indian wards only affect the operation within the colony, of such state as conflicts with the Federal enactments.

Thus in *McGowan,* the Federal Government was not asserting exclusive jurisdiction; further it appears that there was no challenge to the wardship status of the Indian residents. Additionally, it appears that the land in question was continuous and unbroken by areas owned by parties other than the federal government; it may be assumed that only Indian wards occupied the land also. In the instant cases, exclusive federal jurisdiction is asserted over some 19,000 acres, neither continuous nor contiguous, only a portion of which are occupied by Mississippi Choctaws.

CONCLUSION

Unless Federal Indian law is grounded in impermissible racial considerations, it must flow from constitutionally prescribed *tribal* perspectives. In the case of the Choctaws, the tribe was removed from Mississippi in accordance with a properly-ratified treaty. Individuals were permitted to remain behind as citizens of Mississippi. For almost a century they were subject only to state jurisdiction. Attempts to provide them with economic advancement via rejoining their kinsmen in the Indian Territory came to naught, but Congress provided for their relief as it has often provided for the relief of economically distressed people. From this relief measure, the government through its Department of Interior has built a structure now asserting dominion over these people and a consequential ousting of the state's jurisdiction over some 19,000 acres of Mississippi land. There is no legislative cement supporting this position. The courts below correctly analyzed the situation and properly applied relevant legal principles. Their judgments must be affirmed.

Respectfully submitted,

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CERTIFICATE

I, Catherine Walker Underwood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief of the State of Mississippi to:

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This, the 4th day of April, A. D., 1978.

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APPENDIX

UNITED STATES of America et al.,
Plaintiffs-Appellees,

v.

STATE TAX COMMISSION OF the
STATE OF MISSISSIPPI et al.,
Defendants-Appellants.

No. 73-3034.

United States Court of Appeals,
Fifth Circuit.

Dec. 13, 1974.

The United States brought suit on behalf of Mississippi Band of Choctaw Indians to enjoin the Mississippi State Tax Commission from assessing, collecting, and attempting to collect sales taxes from a construction company which was formed at request of tribal council. The United States District Court for the Southern District of Mississippi, at Jackson, William Harold Cox, J., entered judgment granting a permanent injunction, and the Commission and the sheriff of Neshoba County appealed. The Court of Appeals, Coleman, Circuit Judge, held that the construction company was an entity separate and distinct from the Mississippi Band of Choctaw Indians, the group named as beneficiary of the exemption in Mississippi's sales tax statutes, that the United States was attempting to lend its name to a suit on behalf of a private corporation and was not the real party in interest, and that tribal character of Choctaw Indians in Mississippi came to an end when the United States Senate ratified the Treaty of Dancing Rabbit Creek in 1831, and the Mississippi Choctaws

did not become a tribe and live on a reservation as result of the Wheeler-Howard Act of 1934 and proclamation of the Department of Interior issued in 1944.

Reversed and remanded with directions.

1. Corporations (Key) 1.3

Under Mississippi law, a corporation is an entity separate and distinct from its stockholders.

2. Corporations (Key) 1.1(2), 1.3

In Mississippi, a corporation is a creature of the law and it is a legal personality, separate and apart from that of its owners.

3. Corporations (Key) 1.5(2)

Corporate fiction is not to be disregarded because of mutuality of corporate names, stockholders and officers, under Mississippi law.

4. Corporations (Key) 1.5(3)

Fact that one entity owns all stock in the other is not determinative of whether corporate fiction may be disregarded.

5. Corporations (Key) 1.6(11)

In determining whether construction company formed at request of tribal council was an entity separate and distinct from Mississippi Band of Choctaw Indians, the group named as beneficiary of exemption in Mississippi's sales tax statutes, the test was whether the construction company as a corporation actively owned and conducted its own business. Code Miss.1942, § 10116.

6. Corporations (Key) 1.7(2)

Although construction company was formed at request of tribal council and its directors were all members of Mississippi Band of Choctaw Indians, the company, which was chartered under Mississippi law, was an entity separate and distinct from the Mississippi Band, which was group named as beneficiary of exemption in Mississippi's sales tax statutes, in view of evidence showing that tribal council was not the same as the construction company, that 35% of company's employees were not Indians, and that the houses being built could be occupied by those who were not Indians.

7. Federal Civil Procedure (Key) 139

In view of showing that construction company formed at request of tribal council was an entity separate and distinct from Mississippi Band of Choctaw Indians, which was group named as beneficiary of exemption in Mississippi's sales tax statute, the federal government, which brought suit on behalf of the Mississippi Band to enjoin Mississippi State Tax Commission from assessing, collecting and attempting to collect sales taxes from the construction company, was attempting to lend its name to a suit on behalf of a private corporation and was not the real party in interest, as required by federal rule. Code Miss.1942, § 10116; Fed.Rules Civ.Proc. rule 17(a), 28 U.S.C.A.

8. Courts (Key) 302

Statute vesting federal courts with jurisdiction of actions commenced by the United States did not give district court jurisdiction to hear action brought by the United States on behalf of Mississippi Band of Choctaw Indians to enjoin Mississippi State Tax Commission from assessing, collecting and attempting to collect sales taxes from con-

struction company which was formed at request of tribal council, but which was an entity separate and distinct from the Mississippi Band. 28 U.S.C.A. § 1345.

9. Indians (Key) 27(2)

Statute vesting district courts with original jurisdiction of all civil actions brought by an Indian tribe wherein controversy arises under the Constitution, laws or treaties of the United States did not furnish jurisdictional basis for action brought by the United States on behalf of Mississippi Band of Choctaw Indians to enjoin Mississippi State Tax Commission from assessing, collecting and attempting to collect sales taxes from construction company which was formed at request of tribal council, but which was an entity separate and distinct from the Mississippi Band. 28 U.S.C.A. § 1362.

10. Courts (Key) 262.8(1)

Statute prohibiting a federal court from enjoining assessment of a state tax where a plain, speedy and efficient remedy exists in state court was applicable so as to preclude district court from entertaining action brought by the United States on behalf of Mississippi Band of Choctaw Indians to enjoin Mississippi State Tax Commission from assessing, collecting and attempting to collect sales taxes from construction company which was formed at request of tribal council, but which was an entity separate and distinct from the Mississippi Band. 28 U.S.C.A § 1341.

11. Indians (Key) 3

Under the Treaty of Dancing Rabbit Creek, any individual who decided to remain in state of Mississippi could not be denied privilege of joining his brethren in

Indian territory, but was cut off from any portion of annuity payable to the tribe under the treaty, because he had already received his compensation in form of land.

12. Indians (Key) 3

When Treaty of Dancing Rabbit Creek was ratified by United States Senate in 1831, the tribal character of the Choctaw Indians in Mississippi came to an end.

13. Indians (Key) 3

The Choctaw Indians in the state of Mississippi, whose tribal character came to an end when the United States Senate ratified the Treaty of Dancing Rabbit Creek in 1831, did not become a tribe and live on a reservation as a result of the Wheeler-Howard Act of 1934. Wheeler-Howard Act, § 19, 25 U.S.C.A. § 479.

14. Indians (Key) 6

The Choctaw Indians in the state of Mississippi, who voted to accept benefits of the Wheeler-Howard Act, could not confer upon themselves the benefit of a law in which, by its very terms, they had not been included. Wheeler-Howard Act, § 19, 25 U.S.C.A. § 479.

15. Indians (Key) 6

Failure of Wheeler-Howard Act of 1934 to include Choctaw Indians in state of Mississippi, whose tribal character came to an end when United States Senate ratified Treaty of Dancing Rabbit Creek in 1831, was not and could not have been cured by 1944 proclamation of the Department of the Interior which was grounded on the Act, which purported to recognize tribal organization of the Mississippi Band of Choctaw Indians, and which at-

tempted to declare that the lands purchased for their use and held for them in trust was an Indian reservation; and such proclamation was not binding on state of Mississippi in exercise of its lawful authority over its citizens, human or corporate. Wheeler-Howard Act, § 19, 25 U.S.C.A. § 479.

James Holmes Haddock, Jackson, Miss., Carl F. Andre, A. F. Summer, Atty. Gen. of Miss., Jackson, Miss., for defendants-appellants.

Robert E. Hauberg, U. S. Atty., James B. Tucker, Asst. U. S. Atty., Jackson, Miss., Wallace H. Johnson, Asst. Atty. Gen., Lands Div., Larry G. Gutterridge, Jacques B. Gelin, Dept. of Justice, Washington, D. C., for plaintiffs-appellees.

Before COLEMAN, CLARK and RONEY, Circuit Judges.

COLEMAN, Circuit Judge:

This is an appeal by the Mississippi State Tax Commission and the Sheriff of Neshoba County from a judgment granting a permanent injunction against the assessment and collection of sales and contract taxes from the Mississippi Band of Choctaw Indians, the Chata Development Company, and the Choctaw Housing Authority. The District Court held that under the federal Constitution and a state exemption hereinafter described the Tribe and its instrumentalities were exempt from such taxes.

We reverse, with directions to dismiss the complaint for lack of jurisdiction.

FACTS

In 1965, to take advantage of low rent federal housing programs, the Mississippi Band of Choctaw Indians acted to establish the Choctaw Housing Authority.

In 1968, the Mississippi Legislature specifically exempted from sales tax "sales to the Mississippi Band of Choctaw Indians, but not to Indians individually", Section 8, Chapter 588, Miss.Laws, 1968. Exempting one group from the payment of taxes which other groups are required to pay, with no rational basis stated, raises substantial "equal protection" specters. For the purposes of this litigation the validity of the exemption is assumed, but that is an assumption only. In any event, the statutory exemption was granted solely to "the Mississippi Band of Choctaw Indians", with nothing said as to any separately identifiable agencies or subsidiaries or instrumentalities of the Band.

In 1970, at the request of the "tribal council", the Chata Development Company was *incorporated* under the laws of Mississippi as a non-profit corporation but for the purpose of engaging in certain aspects of the construction business [Chata is an ancient method of spelling "Choctaw"].

In 1971, Chata made a contract with the Choctaw Housing Authority to build some fifty houses for $696,772. On September 9 of that year the Tax Commission instructed Chata to file a return and pay the sales taxes required of a contractor. The "tribal council" replied by letter, claiming the benefit of the 1968 exemption.

In October, the Tax Commission informed Chata that neither it nor the Housing Authority (as distinguished from the Mississippi Band of Choctaw Indians) were exempt from sales tax on purchases and filed its notice

of tax lien and judgment in the sum of $19,161.23, solely against Chata, the non-profit corporation. On November 4, 1971, on the tax lien filed, the Tax Commission instituted garnishment proceedings against Chata.

There was no request filed with the State Tax Commission for a hearing, see sources cited in Section 27-65-45, Miss.Code, 1972. There was no suit in the Chancery Court for refund, or appeal to the Supreme Court, as authorized by Section 27-65-47, Miss.Code, 1972, and predecessor statutes. The remedial procedures provided by Mississippi law were wholly bypassed.

On May 18, 1972, the United States rode into the fray. It brought suit on behalf of the Mississippi Band to enjoin the Tax Commission from assessing, collecting, and attempting to collect sales taxes from the Development Company and the Authority. The suit also sought to have declared null and void the tax lien entered against Chata.

The District Court found that the United States was not the real party in interest (Rule 17(a), Federal Rules of Civil Procedure), allowed Chata Development Company, against whom the taxes had been assessed, to join the suit as the real party plaintiff, held that the Mississippi Legislature had exempted the Choctaw Band from the taxes in question, and permanently enjoined the defendants:

(1) from assessing, collecting, or attempting to collect any taxes levied by the provisions of the Mississippi State Tax law from the Mississippi Band of Choctaw Indians, Chata Development Company, and Choctaw Housing Authority;

(2) from assessing, collecting, or attempting to collect from any material men and suppliers furnishing materials to the Mississippi Band, Chata, or the

Choctaw Housing Authority any tax under § 10108, Miss.Code Ann., 1942;

(3) from proceeding further to collect the $19,161.23 alleged due in the cause then pending in Neshoba County Circuit Court;

(4) the tax lien was declared null and void.

Appellant State Tax Commission argues that the United States had no lawful authority to bring this action, that the District Court lacked jurisdiction of the parties and the subject matter, and that if a controversy existed it was for state administrative and judicial determination, rather than federal.

When this suit was initially filed, the United States asserted jurisdiction on 28 U.S.C. § 1345 and § 1362. In order for § 1345 to apply, suit must be brought by the United States, or one of its agencies or officers thereof. However, the District Court found that the United States was not the real party in interest and ordered that the Chata Development Company, a Mississippi corporation, be joined as a party plaintiff. Chata was joined, and the suit proceeded.

Whether Chata, the corporation, was obligated to pay the sales taxes required of it as the building contractor was the real issue in the case. As already indicated Rule 17(a), Fed.R.Civ.P. requires that *every* action be prosecuted in the name of the real party in interest. The United States sought to meet this requirement by alleging that the suit was brought on behalf of the Mississippi Band of Choctaw Indians, that Chata "is an instrumentality and subsidiary of the Tribe, established by tribal resolutions". In any event, the United States sought no recovery for itself but only on behalf of a corporate taxpayer.

The United States knew that it could not lend its name to a suit for the benefit of private litigants, United States v. San Jacinto Tin Company, 125 U.S. 273, 8 S.Ct. 850, 31 L.Ed. 747 (1888); State of Wisconsin v. First Federal Savings & Loan Association, 7 Cir., 1957, 248 F.2d 804, cert. denied 355 U.S. 957, 78 S.Ct. 543, 2 L.Ed.2d 533; Wright, Law of Federal Courts, 68 (2d Ed., 1970).

[1] This presents a problem because Chata had no contract with the Mississippi Band of Choctaw Indians, the group named in the statute as the beneficiary of the exemption. Moreover, Chata, as the contractor, was a corporation, chartered under Mississippi law. The benefits and privileges of such a charter had been sought and obtained when there could have been no doubt about the status imposed upon corporations by law. The law of Mississippi is that a corporation "is an entity separate and distinct from its stockholders", Illinois Central Railroad Company v. Mississippi Cotton Seed Products Company, 166 Miss. 579, 148 So. 371 (1933). Thus in an effort to avoid the taxes which Mississippi corporations are required to pay, Chata has cast itself in the untenable role of claiming the benefits and denying the burdens of the status which its incorporators voluntarily sought.

[2-5] The Mississippi rule is the same as the general rule, that a corporation is a creature of the law and it is a legal personality, separate and apart from that of its owners, Berger v. Columbia Broadcasting System, 5 Cir., 1972, 453 F.2d 991, cert. denied 409 U.S. 848, 93 S.Ct. 54, 34 L.Ed.2d 89; Burnet v. Clark, 287 U.S. 410, 53 S.Ct. 207, 77 L.Ed. 397 (1932); Overstreet v. Southern Railway Company, 5 Cir., 1967, 371 F.2d 411, cert. denied 387 U.S. 912, 87 S.Ct. 1700, 18 L.Ed.2d 634. The corporate fiction is not to be disregarded because of mutuality of corporate names, stockholders and officers. The fact that one entity

owns all the stock in the other is not determinative. The test is whether Chata as a corporation actively owned and conducted its own business, Overstreet v. Southern Railway Company, *supra*.

Chata's directors are all members of the Band but the testimony revealed that "the tribe is not the corporation" and that the Tribal Council is not the same as the Chata Development Company. The testimony further revealed that 35% of Chata's employees were not Indians and that the houses being built could be occupied by those *who are not Indians*.

[6, 7] In these circumstances, applying Mississippi law, we hold that Chata was an entity "separate and distinct" from the Mississippi Band of Choctaw Indians, the group named as the beneficiary of the exemption in Mississippi's Sales Tax statutes. The United States was attempting to lend its name to a suit on behalf of a private corporation and was not the real party in interest. When it so held, the District Court was right.

[8] In the absence of a justiciable interest on behalf of the United States, 28 U.S.C. § 1345 conferred no jurisdiction.

[9] Neither is 28 U.S.C. § 1362, of any jurisdictional assistance. Chata Development Company is not an Indian Tribe or Band. Even looking through the corporate form to the individual Indian incorporators would not help, for § 1362 contains no general grant of jurisdiction for a suit merely because an Indian is a party, 1 Moore's Federal Practice, § 0.74 [2.-2].

Since this is a Mississippi tax, imposed on the commercial activities of a Mississippi corporation, we detect no federal question in this case.

This does not eliminate all of the serious jurisdictional questions.

There is a specific Act of Congress, 28 U.S.C. § 1341, which reads as follows:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

The application of this statute to Mississippi tax collection procedures had the full dress consideration of this Court in Bland v. McHann, 1972, 463 F.2d 21, cert. denied, 410 U.S. 966, 93 S.Ct. 1438, 35 L.Ed.2d 700 (1973).

We there stated that the statute applied to anticipatory action as well as to ongoing efforts to collect. It also applies to suits for refunds, 463 F.2d at 25. We there reaffirmed the proposition that Mississippi provides a "plain, speedy, and efficient" remedy within the meaning of the statute.

In *McHann* we concluded:

> "Taxpayers' complaints that the Mississippi remedy is inadequate appear in reality to be an argument that a better remedy would be available in the federal courts. Neither the judicial decisions nor § 1341 requires that the state remedy be the best remedy available or even equal to or better than the remedy which might be available in the federal courts. Section 1341 merely requires that the state remedy be 'plain, speedy and efficient.' Thus, in view of the district court's finding, this court's decision in *Monaghan* and our own independent review of the available state remedy, we conclude that the Mississippi remedy is plain, speedy and efficient." 463 F.2d 29.

In *McHann* we relied, as indicated, upon the jurisdictional holding in Shepherd v. Monaghan, 5 Cir., 1958, 256 F.2d 882, which was a Mississippi sales and use tax case and in which the right to recover improperly collected taxes was specifically held to afford an adequate remedy.

[10] The appellees should have invoked the aid of the State Courts in their quest for relief from the tax liability here at issue. The District Court had no jurisdiction to entertain the effort.

THE STATUS OF CHOCTAW INDIANS IN THE STATE OF MISSISSIPPI

Prior to 1871, when Congress put a stop to the practice, there existed a widespread procedure in which the United States made treaties with the respective Indian Tribes, particularly with reference to the acquisition of Indian lands.

Article 6, Clause 2, of the Constitution provides that all treaties made under the authority of the United States "shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding". Consequently, these Indian treaties, when ratified by the Senate, assumed equal status with the Constitution itself as a part of the "supreme Law of the Land".

Prior to the final removal of the Choctaw Indian TRIBE from Mississippi to the Indian Territory, which occurred pursuant to the terms of the Treaty of Dancing Rabbit Creek, ratified by the Senate February 24, 1831, the United States made the following treaties with the Tribe:

Choctaw Indian TREATIES

(See Hutchinson's Miss.Code, 1848,
Chapter V, pp. 117-136)

Date	Place	Purpose
Jan. 3, 1786	Hopewell, in northwestern South Carolina	Defined the boundaries of the Choctaw Nation North of the 31° of North Latitude, East of the Natchez District.
Dec. 7, 1801	Fort Adams	Permitted the conversion of the Natchez Trace into a federal road; ceded 2,245,720 acres of land between 31° and the Yazoo River.
Oct. 17, 1802	Fort Confederation on the Tombigbee	To mark the boundary from the Chickasawhay to the Tombigbee.
Aug. 31, 1803	Ho-buckin-too-pa	Ceded 1,000,000 acres.
Nov. 6, 1805	Mt. Dexter	Ceded 4,374,244 acres.
Oct. 24, 1816	St. Stephens	Ceded land where Columbus, Mississippi, now stands.
Oct. 18, 1820	Doak's Stand On the Natchez Trace near present day Canton, Mississippi, negotiated by Gen. Andrew Jackson and Chief Pushmataha	Exchanged 5,000,000 acres in Mississippi for lands between the Arkansas, the Red, and Canadian Rivers.
Jan. 20, 1925	Washington	Agrees that all Indians living on the exchanged lands in Mississippi may remain there if they so desire and shall receive 640 acres.

The foregoing treaties culminated in the Treaty of Dancing Rabbit Creek, signed near present day Macon, Mississippi, ceding the last of the Tribal domain in Mississippi, 10,500,000 acres.

Contary to the practice followed in certain notorious cases, the Treaty of Dancing Rabbit Creek required no Indian to leave Mississippi. Permission to remain and become Mississippi citizens was expressly assured.

Article XIV of the Dancing Rabbit Treaty provided:

> *"Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so,* by signifying his intention to the Agent within six months from the ratification of this Treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one half that quantity for each unmarried child which is living with him over ten years of age; and a quarter section to such child as may be under ten years of age, to adjoin the location of the parent. If they reside upon said lands intending to become citizens of the States for five years after the ratification of this treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvement, of the head of the family, or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity." [Emphasis added].

[11] This article is self explanatory. The last sentence of Article XIV: "Persons who claim under this article shall not lose the privilege of a Choctaw citizen,

but if they ever remove are not to be entitled to any portion of the Choctaw annuity", meant that if the individual deciding to remain in Mississippi should ever choose to join his brethren in the Indian Territory he could not be denied that privilege, but he was to be cut off from any portion of the annuity payable to the Tribe under the Treaty, because he had already received his compensation in the form of land. See, Winton v. Amos, *post*.

In the beginning, one third (5,000) of the Choctaws elected to remain in Mississippi; the others were moved West in 1831, 1832, and 1833. Migration continued sporadically, however, and by 1900 only 2,000 Choctaws remained in Mississippi.[1] As a matter of fact, Greenwood Leflore, the head Chief of the Choctaws, whose boyhood home was on the Natchez Trace at French Camp in present day Choctaw County, chose not to go West, became an immensely wealthy man, and exercised his Mississippi citizenship by serving with distinction in the Mississippi State Senate.

The Dancing Rabbit Treaty opens with the following language:

> "Now, therefore, that the Choctaws may live under their own laws in peace with the United States and the State of Mississippi, they have determined to sell their lands east of the Mississippi."

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1. McLemore, A History of Mississippi, 1973, p. 88. Anyone interested in the history of this noble tribe of Red men should read: DeRosier, The Removal of the Choctaw Indians, U. of Tennessee Press, 1970; Debo, The Rise and Fall of the Choctaw Republic, U. of Oklahoma Press, 1961; Foreman, Indian Removal, U. of Oklahoma Press, 1953; Foreman, The Five Civilized Tribes, U. of Oklahoma Press, 1934.

All prior treaties and agreements where inconsistent with the Dancing Rabbit Treaty were declared null and void.

It was further ordained that no part of the land granted the Tribe should ever be embraced in any territory or state, Article IV.

Clearly the Tribe, as an entity, was never to be a part of any state or territory.

[12] Thus, by the specific language of the Treaty, there can be no doubt that when it was ratified by the Senate the tribal character of the Choctaw Indians in Mississippi came to an end.

DeRosier wrote, p. 128, "After more than thirty years of negotiations, the Choctaws had been persuaded to relinquish their precious homeland and emigrate to a new Indian territory in the west".

In Indian Removal, p. 31, Foreman writes that those who did not go west "preferred to stay and be incorporated in the state".

Insofar as the Government of the United States was concerned, the Choctaw Indians who remained in Mississippi after Dancing Rabbit were left in limbo for ninety years, less two (1830-1918).

Congress passed the Act of May 25, 1918 (40 Stat. at L. 573) appropriating monies for the Bureau of Indian Affairs. Under the heading "MISSISSIPPI" the following was provided:

> "For the relief of distress among the full-blood Choctaw Indians of Mississippi, including the pay of one special agent, who shall be a physician, one farmer, and one field matron, $5,000; for their education by

establishing and maintaining day schools including the purchase of lands and the construction of necessary buildings, $20,000; for the purchase of lands, including improvements thereon, not exceeding eighty acres for any one family, for the use and occupancy of said Indians, to be expended under conditions to be prescribed by the Secretary of the Interior for repayment to the United States, under such rules and regulations as he may direct, $25,000; for the purpose of encouraging industry and self-support among said Indians and to aid them in building homes, in the culture of fruits, grains, cotton and other crops, $25,000, which sum may be used for the purchase of seed, animals, machinery, tools, implements, and other equipment necessary, in the discretion of the Secretary of the Interior, to enable said Indians to become self-supporting, to be expended under conditions to be prescribed by the said Secretary for its repayment to the United States on or before June thirtieth, nineteen hundred and twenty-five; in all, $75,000 to be immediately available."[2]

This Act glaringly omits reference to the Mississippi Choctaws as a "tribe" and omits any mention of a "reservation". Obviously, none existed.

A special agent was sent to Philadelphia, Mississippi, in 1918, and he found that the Choctaws did not attend school and were generally leading an isolated life. The

2. The United States parted with title to the land either by specific grants in the 1830 Treaty or subsequent patents to private purchasers. It then repurchased this land in the Twentieth Century from the contemporary owners. The State has never by appropriate legislation consented to exclusive jurisdiction by the United States. The government was simply an ordinary proprietor. See Article I, Section 8, Clause 17, United States Constitution; Paul v. United States, 371 U.S. 245, 83 S.Ct. 426, 9 L.Ed.2d 292 (1963).

great majority of the Indians were living in Neshoba, Leake, Newton, Scott, Jones, Winston and Noxubee Counties. The poor health, education and economic status of the people led to the establishment of an agency at Philadelphia in 1918.

The land purchase program was initiated in 1921, Under this program, the government would buy a tract of land, sub-divide it into twenty to forty acre plots, and build a small house on each plot. The land was resold to the Indians on a reimbursable basis. From 1921 until 1932, the government bought 3,680 acres of land for the Choctaws. It was sold to 88 Indians on the reimbursable plan. None of it was ever paid for. The United States now holds it in trust for the Indians, Act of June 21, 1939, 53 Stat. 851.

In Winton v. Amos and others, known as Choctaw Indians, 255 U.S. 373, 41 S.Ct. 342, 65 L.Ed. 684 (1921), the Supreme Court had occasion to review, in depth, the status of the Mississippi Choctaws subsequent to the Dancing Rabbit Treaty. It is to be regretted that the lengthy and expositive analysis set forth in the opinion of the Court cannot be repeated here, but at 378, 41 S.Ct. at 344 we find the following:

> "The mixed-blood Choctaws who elected to remain in Mississippi were provided for under article 19, while the full bloods who remained and elected to become citizens of the state were provided for under article 14; hence fullblood Mississippi Choctaws have always been called 'Fourteenth Article claimants.' Choctaws who remained in Mississippi under that article adopted the dress, habits, customs, and manner of living of the white citizens of the state. They had no tribal or band organization or laws of their own, but were

subject to the laws of the state. They did not live upon any reservation, nor did the government exercise supervision or control over them. No funds were appropriated for their support, though much land was given to them. Neither the Indian Office nor the Department of the Interior assumed or exercised jurisdiction over them, and they never recognized them either individually or as bands, but regarded them as citizens of the State of Mississippi, and the Department held it had no authority to approve contracts made with them."

As late as August 31, 1936, as it appears in the record, the Solicitor of the Department of the Interior ruled that "there is in fact no existing tribe of Indians in Mississippi known as the Choctaw Tribe".

The matter boils down to whether the Mississippi Choctaws became a tribe and live on a reservation as the result of the Wheeler-Howard Act (approved June 18, 1934, 48 Stat. 984) and the Proclamation of the Department of the Interior issued in 1944.

For the reasons hereinafter set forth our answer to both issues is in the negative.

Section 19 of the Wheeler-Howard Act reads as follows:

> "The term 'Indian' as used in this Act shall include persons of Indian descent *who are members of any recognized Indian tribe now under Federal jurisdiction,* and all persons who are descendants of such members who were, *on June 1, 1934,* residing within *the present boundaries of any Indian reservation,* and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act,

> Eskimos and other aboriginal peoples of Alaska shall be considered Indians. *The term 'tribe' wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.* The words 'adult Indians' where used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years." [Emphasis added].

The language of Section 19 positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words "any recognized Indian tribe *now* under Federal jurisdiction" and the additional language to like effect.

[13, 14] The Mississippi Choctaws did not, in June, 1934 fall within the status prescribed by the Act. Their vote in 1935 to accept the benefits of the Act was not authorized by that statute. They could not confer upon themselves the benefit of a law in which, by its very terms, they had not been included.

[15] This omission was not, and could not have been, cured by a Proclamation of the Department of the Interior, grounded on the Act of 1934, which in 1944 purported to recognize the tribal organization of the Mississippi Band of Choctaw Indians and which attempted to declare that the lands purchased for their use and held for them in trust is an Indian Reservation. While this Proclamation may, until set aside in appropriate proceedings, be binding on the Secretary of the Interior, a matter about which Mississippi has no standing to complain, and about which we intimate no opinion, there was no authority in the statute cited in its support and the Proclamation is not binding on the State in the exercise of its lawful authority over its citizens, human or corporate.

Deciding the case before us, and purely in a jurisdictional context, we must reject the assertions of the United States that

> "The Mississippi Band of Choctaw Indians is an Indian tribe."

and

> "The Tribe [is] situated on the Mississippi Band of Choctaw Indians Reservation and in Indian Country in Mississippi over which the United States has exclusive jurisdiction."

Therefore, if we are mistaken in our first holding that the United States is not a real party in interest in the efforts of the corporation to avoid paying the taxes assessed against it, the result is the same. The District Court remains without jurisdiction to entertain the suit.

We intimate no opinion as to the liability of the corporation to pay the tax. It is a matter of state law and, for lack of jurisdiction, is not before us.

The judgment of the District Court is reversed, and remanded with directions to dismiss the complaint, without prejudice to the right of the plaintiffs to seek any appropriate relief provided by state law.

Reversed and remanded, with directions.

UNITED STATES of America et al.,
Plaintiffs-Appellees,

v.

STATE TAX COMMISSION OF the STATE OF MISSISSIPPI et al.,
Defendants-Appellants.

No. 73-3034.

United States Court of Appeals,
Fifth Circuit.

July 19, 1976.

Rehearing and Rehearing En Banc

Denied Oct. 27, 1976.

The United States brought suit on behalf of the Mississippi band of Choctaw Indians to enjoin the Mississippi State Tax Commission from assessing, collecting and attempting to collect sales taxes from a construction company formed at the request of the tribal council. The United States District Court for the Southern District of Mississippi, at Jackson, William Harold Cox, J., granted a permanent injunction. The Court of Appeals reversed and remanded with directions, 505 F.2d 633. The Supreme Court of Mississippi in the context of a criminal case then held that the State of Mississippi retains jurisdiction over criminal offenses committed by Indians on the Choctaw Indian reservation. The Court of Appeals on petition for rehearing, Coleman, Circuit Judge, then held that Congress has not indicated any desire or purpose to oust Mississippi of its jurisdiction over the Choctaw Indians, who have been its citizens, as declared by Treaty, for over 100 years, and jurisdiction of the State of Mississippi over its citizens of Choctaw Indian blood stands unimpaired.

Petition for rehearing denied.

1. Indians (Key) 5

After ratification of Treaty of Dancing Rabbit Creek, Choctaw Indians who chose to remain in Mississippi were no longer an Indian tribe, but were citizens of Mississippi, not wards of the United States; they could reassume Choctaw tribal citizenship only by moving to Indian territory.

2. Indians (Key) 3

By remaining and accepting, or later claiming, lands allotted to those who wished to stay, individual Indian bound himself to provisions of Treaty of Dancing Rabbit Creek, provisions of which were binding both upon the tribe and the United States.

3. Indians (Key) 3

Treaty of Dancing Rabbit Creek is part of supreme law, and cannot be altered by act of Congress, which cannot obliterate jurisdiction of Mississippi over citizens. U.S.C.A.Const. art. 6, cl. 2.

4. Indians (Key) 5

Definition of term "Indian" appearing in one section of 1934 Act in no way altered or amended description of those entitled to organize under terms of another section. Act June 18, 1934, §§ 1 et seq., 16-19, 48 Stat. 984.

See publication Words and Phrases for other judicial constructions and definitions.

5. Indians (Key) 10

Purpose of 1934 Act concerning nonallotment of land of Indian reservation to individual Indians was to legislate for Indian tribes, not for individual Indian, and to give tribes some independence from Bureau of Indian Affairs. Act June 18, 1934, §§ 7, 16, 48 Stat. 984.

6. Indians (Key) 2

Congress has not conferred authority upon Secretary of Interior to create Indian tribes where none has existed. Act June 18, 1934, §§ 7, 16, 48 Stat. 984.

7. Indians (Key) 3

Nothing in various Congressional enactments indicates desire or purpose to abrogate Dancing Rabbit Treaty. U.S.C.A.Const. art. 1, § 8, cl. 17; art. 6, cl. 2; Act May 25, 1918, § 9, 40 Stat. 561; Act June 18, 1934, §§ 1 et seq., 7, 16-19, 48 Stat. 984; Act June 21, 1939, 53 Stat. 851.

8. Indians (Key) 27(2)

Congress has not indicated any desire or purpose to oust Mississippi of its jurisdiction over Choctaw Indians, who have been its citizens, as declared by Treaty, for over 100 years, and jurisdiction of State of Mississippi over its citizens of Choctaw Indian blood stands unimpaired. U.S.C.A.Const. art. 1, § 8, cl. 17; art. 6, cl. 2; Act May 25, 1918, § 9, 40 Stat. 561; Act June 18, 1934, §§ 1 et seq., 7, 16-19, 48 Stat. 984; Act June 21, 1939, 53 Stat. 851.

James Holmes Haddock, Carl F. Andre, A. F. Summer, Atty. Gen. of Miss., Jackson, Miss., for defendants-appellants.

S. Bobo Dean, Washington, D. C., for Miccosukee tribe of Indians of Florida.

Robert E. Hauberg, U. S. Atty., James B. Tucker, Asst. U. S. Atty., Jackson, Miss., Wallace H. Johnson, Asst. Atty. Gen., Larry G. Gutterridge, Jacques B. Gelin, Lands Div., Dept. of Justice, Washington, D. C., for plaintiffs-appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

ON PETITION FOR REHEARING

(Opinion Dec. 13, 1974, 5 Cir. 1974, 505 F.2d 633)

Before COLEMAN, CLARK and RONEY, Circuit Judges.

COLEMAN, Circuit Judge.

Our original opinion in this case is reported, 505 F.2d 633 (5 Cir. 1974).

Since the rendition of that opinion, the Supreme Court of Mississippi, in the context of a criminal case, has had occasion to pass on the issue of whether the State has been deprived of jurisdiction over criminal offenses committed by Indians on the Choctaw Indian Reservation. In an exhaustive, scholarly opinion, it was held that Mississippi retains such jurisdiction. *Tubby v. State*, 327 So.2d 272 (Miss., 1976).

There are two decisive factors in this case.

I

The Chata Development Company

In the prior opinion we held that Chata, a Mississippi corporation, chartered in compliance with Mississippi law, is an entity separate and apart from the Mississippi Band of Choctaw Indians; that in this suit the United States is attempting to lend its name to a suit on behalf of a private corporation and thus was not a real party in interest.

We adhere to that view.

Chata was a building contractor, no more and no less. It had a contract to build houses for the Choctaw Housing Authority. Unless the Authority was contracting with itself, which would have been a barefaced subterfuge, then Chata's separate identity, capacity, and existence cannot be doubted, as a matter of either law or fact.

II

The Status of the Mississippi Choctaw Indians

[1] After the ratification of the Treaty of Dancing Rabbit Creek the Choctaw Indians who chose to remain in Mississippi were no longer an Indian Tribe, they were citizens of Mississippi, and they most assuredly were not wards of the United States. The only way they could reassume Choctaw tribal citizenship was to move to the Indian Territory.

As cited in the original opinion, a thorough discussion of this situation was authored by Mr. Justice Pitney in *Winton v. Amos*, 255 U.S. 373, 41 S.Ct. 342, 344, 65 L.Ed. 684 (1921). That opinion of the Supreme Court sets forth in interesting detail the many *unsuccessful* efforts of the Mississippi Choctaws to reassume Choctaw citizenship without moving to the Indian Territory. See, also, *Choctaw Nation v. United States*, 119 U.S. 1, 7 S.Ct. 75, 30 L.Ed. 306 (1886).

The opinion in *Amos* was grounded on Article XIV of the Dancing Rabbit Treaty:

> "Each Choctaw head of a family desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the Agent within six months from the ratification of this Treaty, (etc)."

This was an important concession. Unlike the later mistreatment of the Cherokees, no Choctaw had to remove himself to the Indian Territory unless he wished to do so. It was not a surprising arrangement, because the Choctaws had always lived in harmony with the white man. Their proud boast was that, unlike the nearby Chickasaws and Creeks, they had never raised their hands in war against the white man. Great chiefs, like Pushmataha, had rejected the blandishments of Tecumseh in the War of 1812 and had sent him out of the Nation into the hands of the more hospitable Creeks, the result of which, at the hands of Andrew Jackson, is well known. Moreover, the Choctaws were not nomadic. They lived in fixed habitations, cultivating corn and other crops. Thus they were identified as one of the five civilized tribes.

[2] In any event, this Treaty was made by and between the Tribe and the United States and both were bound by its terms. By remaining and accepting (or claiming later, as some did) the lands allotted to those who wished to stay, the individual Indian likewise bound himself to the provisions of the Treaty.

[3] The Treaty of Dancing Rabbit is a part of the Supreme Law, United States Constitution, Article 6, Clause 2, and it cannot be altered by an Act of Congress; Congress cannot obliterate the jurisdiction of Mississippi over its citizens.

This case simply does not fit into the extensive jurisprudential grooves developed with reference to Indian wards or those Indian Reservations which were established either by Treaty or created by Congress for those who never converted their Indian status to that of state citizenship.

The Leech Lake Reservation, the subject of the Supreme Court opinion in *Bryan v. Itasca County, Minnesota* [1976] ..... U.S. ....., 96 S.Ct. 2102, 48 L.Ed.2d 710 was established by a Treaty, and Bryan was a duly enrolled member of the Chippewa tribe.

The Choctaw Indians of Mississippi do not live in Indian country. Except for that land patented to individual Indians under the terms of the Treaty (and not in trust) the Tribe sold all of its land to the United States in 1830. By 1850 virtually every acre of it had been patented to private purchasers by virtue of sales at the Land Offices in Columbus and Paulding. See, *DeCoteau v. District County Court for Tenth Judicial District*, 1975, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300. See also, *Dillon v. Antler Land Company of Wyola*, 9 Cir., 1974, 507 F.2d 940, *cert. denied*, 421 U.S. 992, 95 S.Ct. 1998, 44 L.Ed.2d 482.

In its original brief the Department of Justice asserted:

> "The Mississippi Band's reservation, held in trust for the Indians by the United States, is not under the jurisdiction of the State of Mississippi and is not subject to state tax."

We considered this to be so palpably erroneous that we proceeded in our original opinion to demonstrate our disagreement.

We must confess some bafflement with the wiggling positions taken by the government at various periods of this appeal.

In its original brief the government asserted, as above quoted, that the Mississippi Band's reservation "is not under the jurisdiction of the State of Mississippi".

In a motion to amend the opinion, filed January 28, 1975, the government argued, although it had raised the point in the first place, that it was not necessary to a decision of the case.

In the petition for rehearing, now under consideration, the government argues:

> "Before leaving McGowan [*United States v. McGowan*, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410] we want to clear up a misconception which, we believe, was created by our pleadings and brief. An Indian reservation is never an area of exclusive federal jurisdiction either in a practical sense or under Article I, Section 8, Clause 17 of the Constitution. Compare the opinion of the Court, 505 F.2d 633 at 641 note 2 and 643. Within an Indian reservation tribal jurisdiction and federal jurisdiction largely pre-empt state jurisdiction as to matters affecting the Tribe and its members, but state jurisdiction controls matters exclusively concerning non-Indians. For instance, a crime committed by a non-Indian against another non-Indian in Indian country is tried in state court and under state law. As a corollary state law enforcement officers have free access within Indian reservations. This is not so as to areas of exclusive federal jurisdiction. See, e. g., *New York ex rel. Ray v. Martin*, 326 U.S. 496 [66 S.Ct. 307, 90 L.Ed. 261] (1946); *Draper v. United States*, 164 U.S. 240 [17 S.Ct. 107, 41 L.Ed. 419] (1896). See also *McClanahan v. Arizona State Tax Commission* [411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129]. Consequently the provisions of Article I, Section 8, Clause 17 of the Constitution and the holding in *Paul v. United States*, 371 U.S. 245 [83 S.Ct. 426, 9 L.Ed.2d 292] (1963), requiring formal state consent to establishing an area of exclusive federal jurisdiction, are inapplicable to

> the establishment of an Indian reservation. See *United States v. McGowan, supra*, 302 U.S. at 539 [58 S.Ct. 286]."

The government argues that by reason of certain Congressional enactments beginning with May 25, 1918, eighty eight years after the Treaty, the State has lost its jurisdiction over its Choctaw Indian citizens.

An examination of the various Congressional enactments since 1918 has been a matter of considerable interest. A brief synopsis of the Legislative history of these Acts will be set forth in the Appendix to this opinion.

We take first the Act of May 25, 1918, 40 Stat. 561. This was an appropriation bill. It referred to the "full-blood Choctaw Indians of Mississippi" and to "the relief of [their] distress". The entire statute [40 Stat. at 573] reads as follows:

MISSISSIPPI

> Sec. 9. For the relief of distress among the full-blood Choctaw Indians of Mississippi, including the pay of one special agent, who shall be a physician, one farmer, and one field matron, $5,000; for their education by establishing and maintaining day schools including the purchase of land and the construction of necessary buildings, $20,000; for the purchase of lands, including improvements thereon, not exceeding eighty acres for any one family, for the use and occupancy of said Indians, to be expended under conditions to be prescribed by the Secretary of the Interior for its repayment to the United States, under such rules and regulations as he may direct, $25,000; for the purpose of encouraging industry and self-support among said Indians and to aid them in building homes, in the culture of fruits, grains, cotton, and other crops, $25,000,

which sum may be used for the purchase of seed, animals, machinery, tools, implements, and other equipment necessary, in the discretion of the Secretary of the Interior, to enable said Indians to become self-supporting, to be expended under conditions to be prescribed by the said Secretary for its repayment to the United States on or before June thirtieth, nineteen hundred and twenty-five; in all, $75,000, to be immediately available.

The Act does not refer to the Indians as a tribe, it does not mention an Indian Reservation, and it offered no help to those of less than the full blood. It was what it declared itself to be, a relief act, limited to individual Choctaws of the full blood. It required that one-third of the appropriation be repaid as directed by the Secretary of the Interior and that another one-third should be repaid by June 30, 1925. Obviously, Congress did not consider the Mississippi Choctaws as wards of the government.

It is hardly a matter of surprise, burdened like their white brethren with a hazardous one crop (cotton) economy and discriminatory freight rates which stifled industrial development, that the Indians did not pay for the lands which had been sold them out of the $25,000 appropriated for that purpose. Congress found it advisable to legislate again. It passed the Act of June 21, 1939 [53 Stat. 851]:

AN ACT

To define the status of certain lands purchased for the Choctaw Indians, Mississippi.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title to all lands purchased by the United States for the benefit of the Choctaw Indians

of Mississippi, under authority contained in the Act of May 25, 1918 (40 Stat.L., 573), and similar subsequent Acts, not under contract for resale to Choctaw Indians, or on which existing contracts of resale may hereafter be canceled, is hereby declared to be in the United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior.

Approved, June 21, 1939.

Title to the lands was "declared to be in the United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior". Only those individuals designated by the Secretary of the Interior were to have the benefit of this Act. Neither a tribe nor a reservation is mentioned.

This brings us to a consideration of the Act of June 18, 1934 [48 Stat. 984], upon which the government so strongly relies for the proposition that the State of Mississippi has been ousted of jurisdiction over its Indian citizens, the Treaty of Dancing Rabbit Creek to the contrary notwithstanding.

Shorn of extraneous provisions, this Act reads as follows:

That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

Sec. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation

thereof are hereby extended and continued until otherwise directed by Congress.

* * *

Sec. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

* * *

Sec. 7. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided,* That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

* * *

Sec. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the

same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Sec. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided,* That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent

with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

Sec. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

Sec. 19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Approved, June 18, 1934.

Importantly enough, Congress expressly directed that Sections 16, 17, and 18 should not apply to the Choctaw Indian Tribe located in Oklahoma.

We again point to the specific language of Section 16: "Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize * * *".

[4] We adhere to the view originally entertained that the definition of the term "Indian" appearing in Section 19 in no way altered or amended the description of those entitled to organize under the terms of Section 16.

We also adhere to the opinion that:

(1) The Choctaw Indians residing in Mississippi in 1934 were not members of an Indian tribe. The tribe was in Oklahoma. The tribal status of the Mississippi Choctaws had been permanently extinguished by the 1830 Treaty of Dancing Rabbit Creek;

[5, 6] (2) Granting that Section 7 of the 1934 Act authorized the Secretary of the Interior to set up new Indian reservations, we think that the clear intent of Congress was to legislate for Indian tribes, not for individual Indians;

(3) We see nothing in the Acts of Congress conferring authority upon the Secretary of the Interior to create Indian tribes where none had theretofore existed. Under Section 16 only a tribe could organize for self-government, etc. Additionally, we think the purpose was to give the tribes some independence from the Bureau of Indian Affairs;

[7] (4) Nothing in the various Congressional enactments indicates a desire or purpose to abrogate the Dancing Rabbit Treaty;

[8] (5) Nothing in the various Congressional enactments indicates a desire or purpose to oust Mississippi

of its jurisdiction over those who had been its citizens, so declared by Treaty, for over a hundred years.

Consequently, we are of the opinion that the jurisdiction of the State of Mississippi over its citizens of Choctaw Indian blood stands unimpaired.

As to the dealings between the Secretary of the Interior and the United States government, on the one hand, and the Mississippi Choctaws, on the other, we do not purport to pass on their validity *vis a vis* the participants.

The Petition for Rehearing is

DENIED.

APPENDIX

LEGISLATIVE HISTORY

I

ACT of May 25, 1918

The proposal as to the Choctaw Indians of Mississippi was originally lost in the House on a point of order. It came back to the House in a Conference Report on House and Senate versions of the Indian Appropriations Bill.

During the original debate in the House it was shown that Congress had appropriated funds for an investigation of the condition of the Mississippi Choctaws. The report of a member of the Board of Indian Commissioners, who had made the investigation, is printed at Page 1138, Volume 56, Part 2 of the Congressional Record, Sixty Fifth Congress, Second Session. In part, the Commissioner said:

> "The bulk of the Mississippi Choctaws live adjacent to the towns of Tucker, Stratton, and Union, in Neshoba and Newton Counties; in fact, practically one-half live in Neshoba County. A number live in

> Leake, Scott, Kemper, and Attala Counties, and there are families scattered over various other portions of the State.
>
> * * *
>
> "The Choctaws of Mississippi have a very good name as regards honesty, truthfulness, cleanliness, and general morality.
>
> * * *
>
> "I am not prepared to advocate a reservation for these people."

The Commissioner concluded by recommending the steps actually taken in the Act of May 25, 1918.

During the original debate in the House, Representative Ferris of Oklahoma, made the following remarks (Page 1140):

> "MR. FERRIS. Mr. Chairman, the gentleman from Mississippi [MR. VENABLE] has just offered an amendment providing for the creation and establishment of a small Government agency to preside over and serve as a protectorate over some 1,100 Choctaw Indians living in Mississippi. This presents a new phase of it; it deserves attention.
>
> "The Choctaw question is not a new one in this House. It has been debated and voted upon many times. In a word, the contention of the Mississippi delegation has always been in the past that they were entitled to share in the funds of the Oklahoma Indians, although they refused to move west and take up residence with them, and still so refuse.
>
> "I have always opposed the adoption of the latter course and oppose it today. No one, either in law, equity, or good morals, I think, can justly advocate such a course.

"More than 90 years ago the Choctaw Tribe of Indians resided in the State of Mississippi. They then owned approximately 15,000,000 acres of land in Mississippi.

"By the treaty of 1820 they traded 4,000,000 acres of that land for what now comprises the Choctaw and Chickasaw Nation in the State of Oklahoma, an area in the treaty described by metes and bounds which, originally comprised what was then the Indian Territory, now a part of Oklahoma. The treaty contained a provision which provided for the removal of the Choctaws from the State of Mississippi west, leaving 10,000,000 acres of their land behind in Mississippi.

"Ten years later, in 1830, an additional treaty was entered into between the Choctaw Indians and the Federal Government, which treaty intended to more effectually carry out the provisions of the treaty of 1820, and which contains the fourteenth article, which has always been the bone of contention, and is and can be the only basis of the pretended claims of these Mississippi Indians to share in the estate of the Indians that moved west.

"The total number of Choctaws in 1830 was 18,200. Of these, 15,000 removed as per the terms of the treaty, and approximately 4,000 of them remained behind in Mississippi, refusing to abide by the treaty. These 4,000 Indians that remained in Mississippi from 1830 to 1842 had the right to take up residence and be allotted land on the 10,000,000 acres in Mississippi, and, as fast as they could be identified, were allotted and given allotments from this land.

"Only 143 families were induced to take lands from the 10,000,000 acres in Mississippi, while 3,885 for some cause refused to take allotments during the 12-year period. These 3,885 Indians who had refused to accept allotments were by the Federal Government later given land scrip to the amount of 640 acres for each and every head of the family, 320 acres for every child from 10 years of age, and 160 acres for every child under 10 years of age, one half to be delivered to them in Mississippi by the Federal Government and the other half after they removed from Mississippi to the then Indian Territory.

"The records of the Indian Office show conclusively, without any question of doubt, that this scrip was actually delivered to them and that they actually received the benefits under it.

"It can be had by consulting House Document 898, Sixty-second Congress, second session.

"The last half, or remainder, of the scrip was capitalized at $1.25 per acre and paid to these Choctaw Indians in person by the Indian agent for the Federal Government. (See muster rolls of the Indian Office and vouchers, which show precisely that the Indians first received the land and, second, the money.) The total amount of money paid to the Indians was $872,000, which was in lieu of the last half of the scrip, which they had up to that time been unwilling to accept.

"Thus it will be observed that these Indians have received more land and more money than the Indians who obeyed the treaties, removed west, and suffered the hardships and outrages committed by the wild western tribes of Indians who then lived upon the prairies.

"In addition to this, four Secretaries of the Interior have held that they had no rights to the Indian estate in Oklahoma and that they had had their patrimony, had disposed of it, and were without any claim whatever upon the Oklahoma Indians. Four Secretaries of the Interior shared this view. The Dawes Commission shared this view. The Federal courts in the Jack Amos case adopted this view. This House has four times passed on the matter by an affirmative vote, and each time denied that they had any rights. Both House and Senate Indian Committees have repeatedly passed on it, and always held they had no rights.

"If there ever was a case of res adjudicata, this is one of them, and I assume that the Mississippi delegation have at last adopted the correct theory. However, in the face of all this, it is true that there are some 1,100 dependent Indians in the State of Mississippi without homes, without education, without employment, and without proper attention. To me there can be no great wrong in having the Federal Government, not as a matter of right but as a matter of charity, establish this agency, adopt the gentleman's amendment, and do for these dependent, helpless Indians what we are doing for other tribes in a similar condition in other States.

"There will be good men who will disagree with me about this proposition, both in and out of the Congress of the United States, both on and off the Indian Committee, but for me and mine I have always felt that the Federal Government should not allow the original occupant of the land—I mean the American soil—to go in want, his own improvidence notwithstanding."

When the Conference Report came before the House (Page 6686) Mr. Carter of Oklahoma, said:

"What do we propose to do here with reference to the Mississippi Choctaws?

"Gentlemen have said that in the past I have opposed the Mississippi Choctaw amendment. I have opposed the Mississippi Choctaws taking any part of the funds of the Choctaws in Olahoma, because the courts, the commissions, three Secretaries of the Interior, and two Presidents had decided that they had no equitable interest in those funds. I have no apology whatever for my action with reference to this matter; and if the question ever arises again I hope I may be here on the job to prevent any such injustice and outrage being done the Choctaws in Oklahoma. What I have said with reference to the Mississippi Choctaw connection with the Federal Government is set forth in the records of this House. I quote from the report which I had the honor to assist in making as a member of a committee considering this question several years ago, as follows:

"The Federal Government, as such, is neither legally nor equitably obligated to enroll Mississippi Choctaws with the Choctaws west, and is under only such moral obligation to the Mississippi Choctaws as is due to dependent North American Indians who were originally occupants and owners of the soil, and who have been deprived of their patrimony by white settlers.

"I have no apology to make for that statement, but the gentleman from Iowa [MR. GOOD] says this $75,000 item constitutes a claim against the Federal Government. The difficulty with the gentleman is that he is unable to distinguish between a claim and a gratuity."

II

The Act of June 21, 1939 passed the House and the Senate without comment or debate.

III

Chairman Wheeler of the Senate explained the purpose of the Act of June 18, 1934 (Congressional Record, Seventy Third Congress, Second Session, Volume 78, Page 11,123), as follows:

> "The third purpose of the bill is to stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations.
>
> "This provision will apply only if a majority of the Indians on any Indian reservation desire this sort of organization. As a matter of fact, however, it does not change to any great extent the present tribal organization, except that when a majority of the Indians want to establish this tribal organization and extend the provisions of the bill to it, they may do so."

In the House, Mr. Howard, in charge of the bill, stated (Page 11,732):

> "For the purposes of this act, section 21 defines the persons who shall be classed as Indians. In essence, it recognizes the status quo of the present reservation Indians and further includes all other persons of one-fourth or more Indian blood. The latter provision is intended to prevent persons of less than one-fourth Indian blood who are not already enrolled members of a tribe or descendants of such members living on a reservation from claiming the financial and

> other benefits of the act. Obviously the line must be drawn somewhere or the Government would take on impossible financial burdens in extending wardship over persons with a minor fraction of Indian blood.
>
> • • •
>
> "MR. DICKSTEIN. There have been quite a number of protests from my State in which it is stated that this bill will more or less compel them to go into the amalgamation whether they want to do so or not. Does the bill do this?
>
> "MR. HOWARD. Under this bill no tribe of American Indians will be forced to come under its provisions unless a majority of that tribe shall by vote request to do so."

UNITED STATES of America et al.,
Plaintiffs-Appellees,

v.

STATE TAX COMMISSION OF the
STATE OF MISSISSIPPI et al.,
Defendants-Appellants.

No. 73-3034.

United States Court of Appeals,
Fifth Circuit.

Oct. 27, 1976.

United States brought suit on behalf of Mississippi Band of Choctaw Indians to enjoin the Mississippi State Tax Commission from assessing, collecting, and attempting to collect sales taxes from construction company formed at request of tribal council. The United States District Court for the Southern District of Mississippi, at Jackson, William Harold Cox, J., granted permanent injunction and the Commission and the sheriff appealed. The Court of Appeals, Coleman, Circuit Judge, 505 F.2d 633, reversed and remanded. On petition for rehearing, the Court of Appeals, Coleman, Circuit Judge, 535 F.2d 300, denied the petition. On petition for rehearing and petition for rehearing en banc, the Court of Appeals held that the jurisdiction of the State of Mississippi over its citizens of Choctaw Indian blood stands unimpaired.

Petition for rehearing en banc denied.

1. Indians (Key) 3

Act of Congress may supersede treaties with Indian tribes with respect to disputes between the Government and Indian tribes which are wards of the nation, communities dependent on the United States, owe no allegiance to the states and receive from them no protection.

2. Indians (Key) 3

The 1831 treaty of Dancing Rabbit Creek between the United States and Choctaw Indians may not be superseded by implication.

3. Indians (Key) 7

Congress has plenary power to legislate with reference to Indians, including right to appropriate funds for their benefit as gratuities or otherwise.

4. Indians (Key) 3

Under 1831 Treaty of Dancing Rabbit Creek between the United States and Choctaw Indians, jurisdiction of State of Mississippi over citizens of Choctaw Indian tribe who chose to remain in Mississippi stands unimpaired.

James Holmes Haddock, Carl F. Andre, A. F. Summer, Atty. Gen. of Miss., Jackson, Miss., for defendants-appellants.

S. Bobo Dean, Washington, D. C., for Miccosukee tribe of Indians of Florida.

Robert E. Hauberg, U. S. Atty., James B. Tucker, Asst. U. S. Atty., Jackson, Miss., Wallace H. Johnson, Asst. Atty. Gen., Lands Div., Larry G. Gutterridge, Jacques B. Gelin, Dept. of Justice, Washington, D. C., for plaintiffs-appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC.

Before COLEMAN, CLARK and RONEY, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

We wish to comment on one facet of the petition for rehearing en banc.

The order denying the original petition for rehearing, 535 F.2d at 302, stated:

> "The Treaty of Dancing Rabbit is a part of the Supreme Law, United States Constitution, Article 6, Clause 2, and it cannot be altered by an Act of Congress; Congress cannot obliterate the jurisdiction of Mississippi over its citizens."

Concentrating on the first portion of this sentence, and ignoring the second, the petition for rehearing says, "In fact, case after case has held exactly the opposite."

[1] It is certainly true that on a number of occasions the Supreme Court has held that an Act of Congress may supersede treaties with *Indian tribes*. It was so held in *The Cherokee Tobacco*, 11 Wall. (78 U.S.) 616, 621, 20 L.Ed. 227 (1870); *Ward v. Race Horse*, 163 U.S. 504, 511, 16 S.Ct. 1076, 41 L.Ed. 244 (1896); *Draper v. United States*, 164 U.S. 240, 243, 17 S.Ct. 107, 41 L.Ed. 419 (1896); *Thomas v. Gay*, 169 U.S. 264, 271, 18 S.Ct. 340, 42 L.Ed. 740 (1898); *Lone Wolfe v. Hitchcock*, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903) and *Ex Parte Webb*, 225 U.S. 663, 32 S.Ct. 769, 56 L.Ed. 1248 (1912). These cases, of course, were concerned with disputes between the government and Indian tribes, wards of the Nation, communities dependent on the United States, *owing no allegiance to the States* (emphasis added) and receiving from them no protection, *Lone Wolfe v. Hitchcock, supra*, 187 U.S. at 567, 23 S.Ct. [216] at 222 (quoting *United States v. Kagama*, 1885, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228).

However, the *Hitchcock* Court was careful to note the provisions of the Act of March 3, 1871, which put an end to the practice of making treaties with Indian tribes. That Act specified that

> "no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

The *Hitchcock* opinion continued:

> "That Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress, is also declared in *Choctaw Nation v. United States*, 119 U.S. 1, 27 [7 S.Ct. 75, 30 L.Ed. 306] and *Stephens v. Cherokee Nation*, 174 U.S. 445, 483 [19 S.Ct. 722, 43 L.Ed. 1041]."

When Congress, in 1871, reaffirmed the validity of all prior Indian treaties, the Treaty of Dancing Rabbit had been on the books for forty years, and for nearly that long the Choctaw Indian Tribe had been removed to the Indian Territory. Those of Choctaw blood who chose to remain in Mississippi as citizens had for that long been emancipated from the control and protection of the United States, subject to all the obligations of state citizenship. As noted in our prior opinions in this case, the United States government took no notice of the Mississippi Choctaws until 1918, when, as a "gratuity", it extended financial relief, most of which was to have been repaid.

[2] Leaving aside the factor of intervening state sovereignty over its citizens in matters left to the states under our federal system, the lengthy list of cases cited *supra* make it clear that the Dancing Rabbit Treaty may not be superseded by implication—see, particularly, *Ward v. Race Horse*, 163 U.S. at 511, 16 S.Ct. 1076.

The dispositive point is that throughout a period of 145 years the Congress has never passed an act specifying a purpose to supersede the Treaty of Dancing Rabbit or declaring that the State of Mississippi shall be deprived of the jurisdiction appropriately belonging to it. To the contrary, as pointed out in our previous opinions, especially in the legislative history appearing at 535 F.2d 306, Congress has repeatedly declined earnest solicitations that it take such action with reference to the Mississippi Choctaws.

[3] The plenary power of Congress to legislate with reference to Indians, including its right to appropriate funds for their benefit, as gratuities or otherwise, is not disputed. In the preceding opinion, 535 F.2d 306, we have stated that "As to the dealings between the Secretary of the Interior and the United States government, on the one hand, and the Mississippi Choctaws, on the other, we do not purport to pass on their validity *vis a vis* the participants", 535 F.2d 306.

[4] What we hold, and all that we hold, is that "the jurisdiction of the State of Mississippi over its citizens of Choctaw Indian blood stands unimpaired."

Quoting the Supreme Court, "we cannot remake history", *DeCoteau v. District County Court for Tenth Judicial District*, 1975, 420 U.S. 425, 95 S.Ct. 1082, 1095, 43 L.Ed.2d 300.

The petition for rehearing en banc is DENIED.

FOR ARGUMENT

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-575

SMITH JOHN and HARRY SMITH JOHN, *Appellants,*

v.

STATE OF MISSISSIPPI, *Appellee.*

On Appeal From the Supreme Court of Mississippi

and

No. 77-836

UNITED STATES OF AMERICA, *Petitioner,*

v.

SMITH JOHN and HARRY SMITH JOHN, *Respondents.*

On Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF SMITH JOHN

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April 1978

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In the Supreme Court of the United States

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REPLY BRIEF OF SMITH JOHN

ARGUMENT

1. The Nature of Indian Country Jurisdiction

In response to defendant's reliance on *United States* v. *McGowan*, 302 U.S. 535 (1938), the State quotes a portion of the Court's opinion in that case to the effect that federal jurisdiction over the Colony

is not exclusive in all circumstances. Miss. Br. pp. 45-46. The State appears to imply by that reference that the Reno Indian Colony there involved is different from other Indian country. The converse proposition, that defendant and the United States are asserting exclusive federal jurisdiction over the Choctaw Reservation for all purposes, is suggested at Miss. Br. pp. 27 and 46. Both of the State's points are incorrect, and the quoted language from *McGowan* is correct as to Indian country generally.[1]

Federal jurisdiction over Indian country is not exclusive of state jurisdiction in all matters. As Defendant's Opening Brief points out (at pp. 48-49), the states retain normal authority over non-Indians in Indian country in all matters not affecting Indians, their property, or infringing tribal self-government.[2] Also Congress has delegated jurisdiction to the states over certain matters, *e.g.*, 25 U.S.C. § 231.

---

[1] In fact the Reno Indian Colony has generally been treated the same as other Indian country since the Court's decision in *McGowan*. *E.g.*, U.S. Dept. of Commerce, Federal and State Indian Reservations and Indian Trust Areas (GPO 1974) pp. 324-25. The Colony's residents have organized under the Indian Reorganization Act and exercise powers of self-government thereunder. *See*, U.S. Dept. of Interior, Governing Bodies of Federally Recognized Indian Groups (GPO 1975) p. 16; U.S. Dept. of Interior, American Indians and their Federal Relationship (GPO 1972) p. 22.

[2] As to non-Indians, the State's brief appears to imply that the Choctaw trust lands have a substantial non-Indian population. Miss. Br. p. 46. This is not relevant, but it is also incorrect. Aside from federal Indian Service employees and spouses of Choctaws, there are virtually no non-Indian residents on Choctaw Indian Reservation lands. Less than 2 percent of the Reservation's residents are non-Indians.

Federal jurisdiction over Indian country preempts state jurisdiction in those areas necessary to fulfill the federal purposes of setting aside Indian country. *Bryan* v. *Itasca County*, 426 U.S. 373, 376 n.2 (1976). These include tribal self-government, *Fisher* v. *District Court*, 424 U.S. 382, 390 (1976), and the Indian Major Crimes Act, *United States* v. *Kagama*, 118 U.S. 375 (1886). In the latter decision (sustaining the Major Crimes Act), the Court's opinion notes the same point as the language the State quotes from the *McGowan* opinion: "[The Major Crimes Act] does not interfere with the process of the state courts within the Reservation, nor with the operation of state laws upon white people found there." 118 U.S. at 385.

2. Enabling Act Clauses.

The State points out that the Mississippi Statehood Act contains no clause reserving federal Indian jurisdiction, such as was included in the enabling or statehood acts of some other states. Miss. Br. p. 16. Presumably the implication is that such clauses are necessary for federal jurisdiction, but this is not the law. Nevada, the state where *United States* v. *McGowan, supra,* arose, had no such clause. Nor did California, where *United States* v. *Kagama, supra* arose. *See also, Apapas* v. *United States,* 233 U.S. 587 (1914); *Donnelly* v. *United States,* 228 U.S. 243 (1913). Federal authority to preempt state jurisdiction has also been sustained in Minnesota, *Bryan* v. *Itasca County,* 426 U.S. 373 (1976); New York, *The New York Indians,* 72 U.S. (5 Wall.) 761 (1867); and Georgia, *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832). None of these states is subject to such a provision.

Further, Congress recognized in Public Law 280[3] that federal authority is the same over states whether or not subject to this kind of clause. Section 6 of the original act provided for acquisition of jurisdiction by states with an enabling act disclaiming clause, and Section 7 provided for acquisition by other states, such as Mississippi. The only difference was in the requirement in the former states that the *state* undertake to amend its constitution to eliminate the disclaimer of jurisdiction over Indian lands; there is no distinction regarding federal authority.[4]

3. The Treaty of Dancing Rabbit Creek.

The State principally relies on the Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1830), but the State's analysis ignores numerous subsequent actions which render that treaty a dead letter except as a land cession. As pointed out in Defendant's Opening Brief (at page 10), the treaty was largely superseded by the Treaty of June 22, 1855, 11 Stat. 611 (1855). The 1830 Treaty (art. 4) promised that the western lands of the Choctaws would never become a part of any state, but that promise was broken with Oklahoma's creation. Article 14, guaranteeing rights to the Mississippi Choctaws, has also been eliminated. Not only did the government fail to provide the land promised (Def. Open. Br. pp. 8-9), but as the State itself points

[3] Act of August 15, 1953, c. 505, 67 Stat. 588, codified in part and as amended, 18 U.S.C. § 1162; 28 U.S.C. § 1360; 25 U.S.C. §§ 1321-26.

[4] The existence of a federal enabling act clause might bear on other questions, such as whether a later federal statute repealed such a clause by implication. But nothing of this sort is relevant here.

out, the 1906 allotment of Choctaw lands in Oklahoma closed the Oklahoma Choctaw rolls to the Mississippi Choctaws. Miss. Br. pp. 42-43. This repealed article 14's promise that the Mississippi Choctaws "shall not lose the privilege of a Choctaw citizen."[5] The 1830 Treaty always was an anomalous one, since the Choctaws received neither lands nor money in exchange for cession of their Mississippi lands. (Their western lands had been provided under earlier treaties.) In any event, defendant relies on the more recent series of actions by Congress and the Interior Department to reassert federal protection over the Choctaws. These specific actions prevail over the inferences the State extracts from the treaty.

4. Tribal Existence.

The State argues that tribal existence is necessary for federal jurisdiction. Miss. Br. pp. 13-14. It is true that Indian status depends on tribal origin, but the State carries the argument well beyond what is supported by the law. Where the federal government has acted to divide or fragment the tribes, the government has always been able to deal with the results of its actions. *See,* Def. Open. Br. p. 45. In a number of circumstances, this Court has sustained federal jurisdiction over individual Indians without reference to

[5] The State also asserts that the Oklahoma Choctaw Tribe was terminated in 1906. Miss. Br. pp. 23-24. This is not correct. Congress passed an act to terminate the Oklahoma Choctaw Tribe in 1959, Act of Aug. 25, 1959, Pub. L. 86-192, 73 Stat. 420, but repealed it in 1970, Act of Aug. 24, 1970, Pub. L. 91-386, 84 Stat. 828. *See,* U.S. Dept. of Interior, Governing Bodies of Federally Recognized Indian Groups (GPO 1975) p. 5, listing the Oklahoma and Mississippi Choctaws separately. Also, the BIA maintains an Agency in Talihina, Oklahoma, in the Choctaw country.

any tribal organizations. *E.g., United States* v. *McGowan,* 302 U.S. 535 (1938) (Indians of Nevada); *Apapas* v. *United States,* 233 U.S. 587 (1914) (an Indian from one of the fragments of California tribes); *see also, United States* v. *Holliday,* 70 U.S. (3 Wall.) 175 (1866). Both Congress and this Court have defined Indian allotments as Indian country. 18 U.S.C. § 1151(c); *United States* v. *Ramsey,* 271 U.S. 467 (1926); *United States* v. *Pelican,* 232 U.S. 442 (1914). Federal criminal jurisdiction over such allotments does not depend on tribal existence in the sense of the State's argument.

The State also relies on an unpublished opinion of the Secretary of the Interior, dated August 31, 1936, stating that the Choctaws in Mississippi were not then a separate tribe. Miss. Br. p. 34. The opinion does so state, but the State neglects to report the remainder of its conclusions. The opinion was titled "Purchases Under the Wheeler-Howard Act" and concerned the question of the form in which the United States should take title to trust purchases for Choctaws in Mississippi under Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465. Solicitor Margold concludes that the lands could not be taken in tribal trust, because there was no tribe at that time. He therefore recommends:

> Therefore, I suggest that the titles now being acquired be taken as follows:
>
> > The United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior, until such time as the Choctaw Indians of Mississippi shall be organized as an Indian tribe pursuant to the Act of June 18, 1934 (48 Stat. 934), and then in trust for such organized tribe.

Therefore this opinion when read in full confirms the contemporaneous view of the Interior Department that the Mississippi Choctaws were within the scope of the IRA and entitled to organize pursuant to it.[*]

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Counsel for Smith John
and Harry Smith John

April 1978

[*] For the Court's use, defendant will lodge a copy of this opinion with the Clerk prior to argument.

Supreme Court, U. S.
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Nos. 77-575 and 77-836

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

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Appellants,

v.

STATE OF MISSISSIPPI,

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

No. 77-836

UNITED STATES OF AMERICA,

Petitioner.

v.

SMITH JOHN and HARRY SMITH JOHN,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS AS *AMICUS CURIAE*

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SMITH JOHN and HARRY SMITH JOHN,

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS AS *AMICUS CURIAE*

CONSENT OF ALL PARTIES

All of the parties to the two captioned cases have consented in writing to the filing of this brief *amicus curiae* by the Mississippi Band of Choctaw Indians. The letters of consent are filed herewith pursuant to Rule 42(2) of the Rules of this Court.

INTEREST OF THE *AMICUS CURIAE*

As we show within, the Mississippi Band of Choctaw Indians (the Tribe) is a federally recognized Indian Tribe of more than 3,700 members with a Reservation established by Acts of Congress and declaration of the Secretary of the Interior under authority of the Indian Reorganization Act of 1934, (Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. 461-479).

The decisions of the Supreme Court of Mississippi and of the United States court of appeals hold the Indian Reorganization Act inapplicable to the Mississippi Band of Choctaw Indians, and their reservation invalid (J.S. App 4a, 8a; Pet. App 4a, 19a-20a, 22a). Both Courts also hold that the State of Mississippi has exclusive criminal jursidiction within the land held in trust by the United States for the Mississippi Band of Choctaw Indians and that such trust land is not "Indian Country" within the meaning of 18 U.S.C. 1151 and 1153. (J.S. App. 8a; Pet. App 22a).

The decisions below if allowed to stand will terminate the tribal court system and jeopardize the Tribe's trust relationship with the United States. As this would be destructive to the welfare of the Tribe and its people, the Tribe has a vital interest in these cases.

STATEMENT

1. The Mississippi Choctaw before 1918

The Choctaw Indian Tribe was indigenous to the area now occupied by the State of Mississippi, though its original territory exceeded the State's boundaries.[1] After

[1] See Treaty at Hopewell, January 3, 1786, 7 Stat. 21.

having its territory narrowed through a series of treaties[2] the Choctaw Tribe in 1830 was forced to cede all tribal land in Mississippi.[3] The bulk of the Choctaw Tribe was to move to Oklahoma, individual Choctaw Indians were, however, permitted to remain in Mississippi and were promised a reservation of one section of land each (note 3, supra Article 14).

The promise was not fulfilled. Extensive land frauds by government agents resulted in most of the Choctaws who remained in Mississippi never receiving the land promised them by treaty. As the Court of Claims stated in *Choctaw Nation v. United States,* 81 Ct. Cls. 1, 15:

> [Article 14] is seemingly free from ambiguity. The rights conferred are positive ones, defined with a degree of precision apparently incapable of misapprehension, and notwithstanding this fact the large number of Indians who remained in the State were subjected to a series of maladministration of the article by accredited representatives of the United States that in and of itself discloses an inexcusable, cruel, and unjust procedure never excelled, if equaled, in the history of Indian affairs. Not to exceed 143 heads of families, embracing 276 individual Indians, ever received an allotment under article XIV, and at least 1,155 heads of families embracing at least 3,800 individual Indians were by intimidation, false entries, and destroyed documents cheated out of and denied their rights.[4]

[2] E.G., 1801—Treaty at Fort Adams (7 Stat. 66); 1802—Treaty at Fort Confederation (7 Stat. 73); 1803—Treaty at Hoe-Buckintoo-pa (7 Stat. 80); 1805—Treaty at Mount Dexter (7 Stat. 98);

[3] Treaty at Dancing Rabbit Creek, September 27, 1830, 7 Stat. 333.

[4] The treaty was not fulfilled for the Choctaw who went to Oklahoma either. The principal consideration for their leaving

[footnote continued]

Until the early 1900's the United States largely ignored the Mississippi Choctaws or was concerned only with moving them to Oklahoma. The Mississippi Choctaws, in this period, lived as outcasts in Mississippi, part of neither white nor black society, but, perhaps as a result, retained their language, traditions, and cohesion. They lived primarily in seven aboriginal Indian villages in the area of Philadelphia, Mississippi.[5]

The State of Mississippi gave no services to the Choctaws who remained in the State, and indeed denied the full-blood Choctaws "all social and political privileges" *Winton v. Amos*, 255 U.S. 373, 379 (1921). Eventually the Mississippi congressional delegation spearheaded the move to recognize federal responsibility for the plight of the Mississippi Choctaws, and to have federal Indian programs extended to them.

The Mississippi Choctaws' situation in the early part of this century was described by Representative Venable of Mississippi in supporting a federal Indian appropriation

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their homeland was that "no part of the land granted them [in the west] shall ever be embraced in any territory or State" (Article IV).

As the Indians had suspected, pressures for white entry and then statehood resulted in the formation of the State of Oklahoma despite the treaty promise. See Cohen, *Handbook of federal Indian Law* (GPO 1942) pp. 427-430.

[5]The villages, which remain the centers of the Reservation today, are Bogue Chitto, Bogue Homa, Conehatta, Pearl River, Red Water, Standing Pine, and Tucker. The best history of the Mississippi Choctaws between 1830 and roughly 1970 is John Holbrook Peterson, Jr., *The Mississippi Band of Choctaw Indians: Their Recent History and Current Social Relations*, a doctoral dissertation submitted to the University of Georgia (Athens, Georgia, 1970) and published in facsimile by University Microfilms, Ann Arbor, Michigan (1970), hereafter referred to as "Peterson." We are lodging a copy with the Clerk.

for them. (Hearings before subcommittee of House Committee on Appropriations; Indian Appropriation bill, 1922, 66th Cong. 3d Sess (1920), p. 329):

> . . . . When I came to Congress . . . I was already interested . . . in the condition of the full blood Choctaw Indians of Mississippi, about 1200 of whom live in my district . . . . Their economic condition was very bad. They had no schools, they lived back in the interior along the little creeks and rivers.
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> * * * * *
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> They reserved certain land to themselves when the Choctaw Tribe moved to Oklahoma. But they were relieved of all restrictions. They were a people who had never had any experience in the handling of individualistic property . . . The result . . . was what anyone would have expected, that knowing nothing of the value of the land, and having had no experience in the handling of land, in the course of time they practically lost their lands and parted with them for a song . . . .
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> * * * * *
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> The result is that the Indians, without any fault on their own part and we will say without any fault on the part of the Government—as such—we will say they were unfortunate in their agents—never received any substantial relief at all.
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> * * * * *
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> I did not feel that it was an answer to say that these Indians at one time had certain lands, because the way the Government let them handle these lands produced the result that was inevitable.

The Bureau of Indian Affairs had sent special agents to visit the Mississippi Choctaws in 1908 and again in 1916.

"The reports of these agents emphasized the poor health, education, and economic status of the Choctaws" (Peterson, *op. cit.* 110). With pressure from the Mississippi Congressional delegation (see Peterson, 1093; statement of Representative Venable, supra) an Agency of the Bureau of Indian Affairs was established at Philadelphia, Mississippi in 1918 to serve the Mississippi Choctaws (Act of May 25, 1918, 40 Stat 573; Peterson, 111-118).

2. The Agency

Under a series of specific appropriations beginning with the establishment of the Agency, the United States began purchasing in trust for Mississippi Choctaws land in and around their traditional villages.[6]

While the purchases were being made, the Choctaws were beginning to receive the advantages extended to other Indian tribes by the United States. Thus in the 1920's and early 1930's the United States opened a series of Indian elementary schools providing the first formal education available to most Mississippi Choctaw Indians:

Pearl River School—1920
Standing Pine School—1920
Tucker School—1921
Bogue Homa School—1922
Red Water School—1925
Conehatta School—1928
Bogue Chitto School—1930
(Peterson, p. 129)

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[6]Act of May 25, 1918, 40 Stat. 573; Act of June 30, 1919, 41 Stat. 15; Act of February 14, 1920, 41 Stat. 420; Act of March 3, 1921, 41 Stat. 1236; Act of May 24, 1922, 42 Stat. 570; Act of January 24, 1923, 42 Stat. 1191; Act of March 3, 1925, 43 Stat. 1149; Act of May 10, 1926, 44 Stat. 461; Act of January 12, 1927, 44 Stat. 941; Act of March 7, 1928, 45 Stat. 206; Act of March 4, 1929, 45 Stat. 1568-69; Act of May 14, 1930, 46 Stat. 286; Act of February 14, 1931, 46 Stat. 1121.

A Bureau of Indian Affairs hospital was opened in 1929 and expanded in 1934. (Information supplied by The Choctaw Agency, Bureau of Indian Affairs).

3. The Indian Reorganization Act

The true return to dignity and self-government began for the Mississippi Choctaw Indians as it did for many other tribes in the 1930's.

In 1934 Congress enacted the Indian Reorganization Act, supra, 25 U.S.C. 461-479. Section 5, 25 U.S.C. 465, authorized the Secretary of the Interior, without additional authorization from Congress, to acquire lands ". . . within or without existing reservations . . . for the purpose of providing lands for Indians." Section 7, 25 U.S.C. 467, authorized the Secretary of the Interior to "proclaim new Indian reservations on lands acquired persuant to . . . this Act." Section 19, 25 U.S.C. 479, defined Indians so as to include not only recognized bands as well as tribes but "all other persons of one-half or more Indian blood."

Under these provisions the United States made additional purchases for the Mississippi Choctaws. H. Rpt. No. 194, 76th Cong., 1st Sess. (1939) p. 1. The Interior Department then proposed and Congress enacted the Act of June 21, 1939, 53 Stat. 851, (J.S. App. 1a-2a), which declared that "title to all lands purchased by the United States for the benefit of the Choctaw Indians of Mississippi . . . is hereby declared to be in the United States for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior." The specific purposes of the 1939 Act were to place the lands already purchased for the Choctaw Indians in Mississippi "in the same status as the lands being purchased under the Indian Reorganization

Act" and to "facilitate matters greatly if the Indians should choose to organize under Section 16 of the Indian Reorganization Act and take over administration of their lands" H. Rept. No. 194, *supra*, pp. 2-3.

On December 4, 1944, acting pursuant to the 1939 Choctaw Act and Section 7 of the Indian Reorganization Act, 25 U.S.C. 467, the Secretary of the Interior issued a proclamation listing the lands held in trust by the United States for the Mississippi Choctaws and stating that "such lands are hereby declared to be an Indian reservation for the benefit of those members of the Mississippi Band of Choctaw Indians of one-half or more Indian blood." 9 Fed. Reg. 14907 (1944); Pet. App. 23a-25a. On April 20, 1945, the Secretary ratified the Constitution and Bylaws of the Mississippi Band of Choctaw Indians, limiting membership to Mississippi Choctaw Indians of one-half or more Indian blood (Art. III).

4. The Tribe Since Reorganization

The Mississippi Choctaw Indian population living on or near the Reservation based on a 1974 survey is 3,783 Indians.[7] Unlike many Indian tribes, the majority of the Choctaws are full-blood Indians, and Indians of less than half-blood are, as shown above, not eligible for membership. The 1974 survey shows (*id* p. 16, table 20) that 80.3% of the Choctaws predominantly speak the Choctaw language in their homes; an additional 12.3%

[7] Choctaw Demographic Survey, pp. 2, 4. The Survey, made under grant from the Office of Education, United States Department of Health, Education and Welfare, was published in March, 1975 by the Mississippi Band of Choctaw Indians. We have lodged a copy with the Clerk and served copies on the parties.

speak both Choctaw and English. Only 7.1% reported that they speak predominantly English at home (*ibid*).

The Mississippi Band of Choctaw Indians has made steady progress in a difficult environment under federal trust responsibility, and has developed a strong government and system of social services.

The elementary school system has been improved, with modern facilities in each community and a BIA Choctaw Central High School has been added; the schools offer bi-lingual Choctaw-English programs.

Vast strides have been made in housing, largely Indian built through a tribal construction company and federal funding. The Indian Health Service has recently completed a new hospital on the Reservation and a tribal community health program strives to make medical service available to all the people.

The Tribal government is well situated in a modern complex of buildings, and is well organized and capable.

The total federal expenditure on behalf of the Tribe in fiscal year 1976 was $10,762,400, covering a full range of social services.[8]

5. Law and Order

An important part of the progress of the Mississippi Band of Choctaw Indian has been the establishment of a federal-tribal court system. The Mississippi Choctaw Reservation is located in a portion of Mississippi where white racial intolerance and police insensitivity are well documented recent historical facts, and too often present today. It is important to the progress of the Tribe, a group of culturally, racially and linguistically distinct

[8] The expenditures are detailed in App. B of the Tribe's *amicus* brief supporting review in No. 77-575.

people, that they have federal law enforcement to assure that crimes against them are punished, and thus discouraged. It is equally important to the Tribe that Indians accused of offenses in their communities are apprehended by Indian police and are tried either in the tribal court (misdemeanors)[9] or in federal courts, thus minimizing the effect of local prejudice in apprehension, jailing, and trial.

From December 1944, when the Reservation was established, to 1968, law enforcement, to the extent that it existed, was left to the sheriffs or the counties where the Reservation is located. The results were far from satisfactory. It was difficult to get State law enforcement within the Reservation, and difficult to keep such enforcement from being abusive.

In 1968, on a petition for a writ of *habeas corpus* fully briefing the jurisdictional status of the Reservation for the first time, the judge of the county court for Neshoba County ruled that a crime committed by an Indian on the Reservation was "within the exclusive jurisdiction of the United States federal courts." No appeal was taken by the State, and since that date, until the decisions below, the United States has exercised exclusive criminal jurisdiction over crimes by or against Indians within the Reservation.[10]

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[9]While the Court is commonly referred to as the "Tribal Court" it is a Bureau of Indian Affairs "court of Indian Offenses" See 25 C.F.R. 11.1 *et seq*. Its three principal judges are tribal members. A local lawyer, usually non-Indian, serves as auxilliary judge. See p. 11, *infra*.

[10]See letter dated December 17, 1968, from E.J. Fisher, Acting Superintendant of the Choctaw Agency to the Commissioner, Bureau of Indian Affairs, App. A *infra*.

Law Enforcement is maintained through a Court of Indian Offenses and a police force drawn entirely from the Tribe but paid and directed by the BIA. A well equipped tribal jail was completed in 1974 with Federal Law Enforcement Assistance funds. Prior to that time the government contracted for use of jails as far away as Meridian, Mississippi, to avoid use of local county jails, several of which were considered unsafe for Indian defendants.

After 1968 special treatment was instituted for Indian juvenile offenders through the tribal Youth Center and tribal foster homes.[11]

The nine year performance of the tribal court and police force has won the endorsement not only of the Tribe and its members but of local non-Indian communities as well.

This case occurred in Leake County, Mississippi. As a result of the decisions below, the tribal court was closed and the tribal police force jeopardized. In a letter dated February 1, 1978, to the Superintendent of the Choctaw Indian Agency,[12] the Leake County prosecuting attorney stated:

> I feel that I am qualified to evaluate the effectiveness of the Tribal Court, as I have been Prosecuting Attorney for the past 10 years. There have been a number of occasions during this time wherein we have had to call upon Law and Order to assist us in

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[11]Information concerning the tribal court system Youth Center and jails was furnished counsel by Robert Benn, Superintendent of the Choctaw Agency, Bureau of Indian Affairs, Philadelphia, Mississippi, by letter dated November 22, 1977 and in telephone conversations.

[12]A certified copy is attached as Appendix B *infra*.

serving papers or making arrests on the reservation. To the best of my information, that cooperation has been 100 percent.

Our criminal docket is usually heavy, and the machinery of the Tribal Courts has certainly served to take a burden off Leake County. I have had a chance to observe the justice and punishment meted out by the Tribal Criminal authorities, and here again I believe this has been effective.

I also serve as Youth Court Prosecutor in my capacity as County Attorney. When I first took office, we were dealing with Indians through the Leake County Youth Court. However, it later developed that the Tribal Court took jurisdiction. I feel the latter move has been more effective because you actually have dormitories and physical facilities on the reservation to deal with Indians exclusively and they are probably more responsive to rehabilitation efforts from their own people.

In summary, please consider this my letter of support and best wishes in your efforts in trying to restore the Tribal Court system which existed in 1977. I pledge my support and help in any way needed.[15]

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[15] See also the letter dated February 6, 1978 from the President of the Leake County Board of Supervisors App. C *infra*, and the letter dated February 20, 1978, from the President of the Citizens Bank of Philadelphia, Mississippi, App. D, *infra*.

ARGUMENT

I.

THE TRIBE'S RESERVATION IS VALIDLY ESTABLISHED UNDER THE INDIAN REORGANIZATION ACT.

A. The series of legislation and executive action leading to the establishment of the Mississippi Choctaw Reservation in 1944 is regular and lawful.

In 1918, Congress appropriated money to establish an Indian Agency for the Choctaw Indians in Mississippi. Each year thereafter through 1931, Congress purchased land for the Choctaw Indians which the United States held in trust for them. When the Indian Reorganization Act was enacted, the Secretary of Interior continued purchasing land for the Choctaws under Section 5 of that Act (25 U.S.C. 465) which authorizes the Secretary of the Interior to acquire lands "within or without existing reservations . . . for the purpose of providing lands for Indians." Section 7 of the Act (25 U.S.C. 467) authorizes the Secretary "to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act . . . ."

In order that there would be no confusion as to the lands purchased before the IRA, Congress enacted the Act of June 21, 1939, which specifically declared that land purchased for the Choctaw Indians of Mississippi is held in trust by the United States for such persons "of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior." The purposes of that Act were clearly stated in the committee reports. The Act was to place the land already purchased for the Choctaw Indians in Mississippi "in the same status as the lands being purchased under the Indian Reorganization Act" and to "facilitate matters greatly if

the Indians should choose to organize under Section 16 of the Indian Reorganization Act and take over administration of their lands," H. Rept. No. 194, 76th Cong. 1st sess., pp. 2-3.

Thus in 1944 when the Secretary of the Interior formally proclaimed the land a new Indian reservation, he did so with full and careful authorization by Congress.

B. The Indian Reorganization Act is fully applicable to the Mississippi Band of Choctaw Indians.

1. Congress' power to legislate on Indian Affairs extends to the Mississippi Choctaw.

Contrary to the underlying assumptions of the courts below (J.S. 6a-8a; Pet. App. 13a-14a) Congress' guardianship over Indians is not limited to the protection of intact tribes but reaches the protection of individual Indians and bands or communities of Indians fragmented from tribes, *United States v. Holliday*, 70 U.S. 407, 417-421 (1852). Article I, Section 8, Clause 3 of the Constitution expressly gives Congress power over commerce with the Indian tribes. But Congress' power flows not only from that clause. As war and government policy broke up tribal structures, a broader constitutional base for Congress' power over Indian affairs was recognized by this Court. In *Board of Commissioners v. Seber*, 318 U.S. 705 (1943), this Court, in upholding the immunity from state taxation of land purchased for individual Indians, under two Acts of Congress held (at 715):

> The Acts of 1936 and 1937 are constitutional. From almost the beginning the existence of federal power to regulate and protect the Indians and their property against interference even by a state has been recognized.

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> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands . . . leaving them . . . needing protection. Of necessity, the United States assumed the duty of furnishing that protection, *and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic* [emphasis supplied].

Seber is particularly relevant here because it upholds the constitutionality of Congress' provision of land, and tax immunity, to "un-enrolled Creeks of the half blood or more ***" although the tribal rolls of that Tribe, also removed to Oklahoma, had been closed (318 US at 718-719).

Similarly, in *United States v. McGowan*, 302 U.S. 535 (1938), discussed more fully within, this Court upheld the "Indian country" status of land purchased by Congress for scattered Indians in Nevada, well after Nevada's statehood and after the other Indians of the state had gone to Reservations previously established.

Plainly, Congress had authority to provide trust lands, a reservation, and other federal protections, for the numerous and then destitute Mississippi Choctaws. It would be both senseless and cruel if Congress, having removed the bulk of a tribe to a reservation, was without power later to establish similar federal protection for the remnant left behind—the group often in most need of help.

The Treaty of Dancing Rabbit Creek, much relied upon by the Courts below, is not to the contrary. In the first place the Treaty has long been superseded by other treaties and legislation, including statehood for Oklahoma. See Cohen, *Handbook of Federal Indian Law*,

(GPO 1942) pp. 427-430. Moreover, this Court has consistently recognized, often over the strenuous dissent of Indian tribes, that Congress in its continuing trust responsibility for Indians may alter the provisions of a treaty. E.G., *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587-588 (1977); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 555-566 (1902).

2. The Indian Reorganization Act in fact applies to the Mississippi Choctaws.

The Indian Reorganization Act is not limited to tribes already organized and living on reservations. Section 5 authorizes the Secretary to acquire lands "within or without existing reservations" and further provides that the lands may be acquired "for the purpose of providing lands for Indians," not just for tribes. Neither existing reservations nor existing tribal structures are required. Section 7, indeed, authorizes the Secretary "to proclaim *new* Indian reservations on [such lands]" (emphasis added).[14]

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[14]That Eastern bands of removed tribes such as the Seminole, Cherokee, and Choctaw and other fragmented tribes were not excluded from the act is also shown by the specific exclusion of tribes "located in the State of Oklahoma" and "the Klamath Reservation in Oregon" from certain of the provisions of the act. The remnant bands, which were not located in Oklahoma, and by then were clearly separate from the Oklahoma tribes whose rolls had been closed, were not excluded. See Act of May 31, 1900, 31 Stat. 236, which required Mississippi Choctaws to settle in Oklahoma prior to the approval of the final rolls to be members of the "Choctaw Nation." See also *Choctaw Nation v. U.S.*, 81 Ct. Cls. 1, 19; and see *Maryland Casualty Company v. Citizens National Bank of West Hollywood*, 361 F.2517, 520-521 (C.A. 5, 1966) recognizing the immunity from suit of the Seminole Tribe in Florida organized under the Indian Reorganization Act.

But if there could be any doubt that the act applies to a group such as the Mississippi Choctaws, it is removed by the definition of the scope of the act in Section 19. That Section carefully and specifically defines the Indians to whom it applies in three categories (Section 19):

1. "All persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction . . ."
2. "All persons who are descendants of such members who were on June 1, 1934 residing within the present boundaries of any Indian reservation . . ."
3. "All other persons of one-half or more Indian blood . . . ."

The limitation of the act for Indians not covered by clauses one and two above is in terms of degree of Indian blood, not prior recognition of the band nor prior existence of a reservation. Indeed the House of Representatives had proposed 1/4 Indian blood as sufficient for non-enrolled, non-reservation Indians to receive the benefits of the Act, but the Senate required one-half, and the Senate version prevailed.[15] Thus this is no casual provision, but a deliberate choice by Congress to allow the establishment of reservations for previously unorganized groups of Indians and to bring such Indians under federal trust responsibility if they satisfy the one-half Indian blood requirement.[16]

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[15] H. Rept. No. 1804, 43d Cong. 2d Sess. (1934) p. 3; H. Rept. No. 2049 (Conference Report), 73d Cong. 2d Session (1934) pp. 5-6, 8.

[16]Representative Howard, one of the sponsors of the bill, explained Section 21 of the House bill (Section 19 of the Act) as follows: (Cong. Rec. June 15, 1934, p. 12056)

> For the purposes of this act, section 21 defines the persons who shall be classed as Indians. In essence, it recognizes the

[footnote continued]

C. The decision by the Secretary of Interior to proclaim the Reservation should be given great weight.

Congress, as we have shown, enacted the Act of June 21, 1939, for the express purpose of allowing the Mississippi Band of Choctaw Indians to organize under the IRA if it so chose. The Secretary in 1944 proclaimed the land a reservation and in 1945 approved the Constitution of the Tribe. Decisions of this sort, which are of a largely political nature, have traditionally been afforded great weight by this Court.

For at least 100 years, this Court has without exception deferred to decisions by the Secretary of Interior and Congress as to whether an entity is an Indian tribe. In *United States v. Holliday, supra,* 70 U.S. 407, 419 (1866), the Court held that:

> "In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same."

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status quo of the present reservation Indians and further includes all other persons of one-fourth or more Indian blood [one-half in the Senate bill]. The latter provision is intended to prevent persons of less than one-fourth Indian blood who are not already enrolled members of a tribe or descendants of such members living on a reservation from claiming the financial and other benefits of the act. Obviously the line must be drawn somewhere or the Government would take on impossible financial burdens in extending wardship over persons with a minor fraction of Indian blood.

The Senate drew the line at one-half. See also the 1935 legal opinion attached to the Solicitor General's petition for certiorari, Pet. App. 46a-48a.

See also *The Kansas Indians*, 72 U.S. 737, 755-756 (1867) (federal recognition of continued existence of tribe prevented State taxation of tribal land).

An unbroken line of cases—*United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188, 195 (1876); *United States v. Sandoval*, 231 U.S. 28 (1913); and *United States v. Candelaria*, 271 U.S. 432 (1926)—confirms that the courts will not review recognition of an Indian tribe by the executive or legislative branches unless that decision is "arbitrary" or a "manifestly unauthorized exercise of power." *United States v. Sandoval*, supra at 46; *Baker v. Carr*, 369 U.S. 186, 216 (1962). See also the discussion of *McGowan, infra* p. 15.

The legislation authorizing the Secretary's action here, the characteristics of the Tribe, the existence of an active federal agency and congressional support since 1918, all preclude any suggestion of arbitrariness in the Secretary's recognition of the Mississippi Band of Choctaw Indians and his declaration establishing their reservation.

II.

THE TRIBE'S RESERVATION IS INDIAN COUNTRY UNDER 18 U.S.C. 1151 AND CONSEQUENTLY IS UNDER THE EXCLUSIVE CRIMINAL JURISDICTION OF THE UNITED STATES AND THE TRIBE AS TO CRIMES INVOLVING INDIANS.

Federal criminal jurisdiction depends on whether the land in question is "Indian country" as defined in 18 U.S.C. 1151. That section (enacted as law with the rest of Title 18 by the Act of June 29, 1948, 62 Stat. 683) defines three types of land as Indian country:

1. "all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . ."

2. "all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state . . ."

3. "all Indian allotments, the titles to which have not been extinguished . . . ."

The revision note, published with the Section, shows that it is "based on latest construction of the term by the United States Supreme Court in *U.S. v. McGowan,* 302 U.S. 535 . . . . Indian allotments were included in the definition on authority of the case of *U.S. v. Pelican*, 232 U.S. 442."

A. The Tribe's reservation, as a reservation established under federal law, is Indian country.

As we have shown, the Reservation was validly established as a reservation under the Indian Reorganization Act and the Act of June 21, 1939. All land within the Reservation (here there is only trust land) is thus Indian country under the first clause of 18 U.S.C. 1151, as lands within the limits of any Indian reservation under the jurisdiction of the United States.[17]

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[17] The language "under the jurisdiction of the United States" might appear redundant or to beg the question. Its purpose becomes clear if it is borne in mind that there are numerous State Indian reservations in which land is not held in trust by the U.S. and as to which the United States asserts no criminal jurisdiction. Some of these are: the Passamaquoddy and Penobscot Reservations in Maine and the Alabama-Coushatta Reservation in Texas. See Map, Indian Land Areas, U.S. Department of the Interior, Bureau of Indian Affairs, 1971.

B. The Tribes' land is equally Indian country as a dependent Indian community.

Congress' inclusion of dependent Indian communities within its definition of "Indian country" is an incorporation of this Court's decision in *United States v. McGowan*, 302 U.S. 535 (1938). That case, we submit, is controlling here.

When the Indians of Nevada were removed to reservations, scattered Indians were left about the State. In 1917 and in 1926, Congress appropriated funds out of which land was bought in trust for these Indians. The Acts closely resembled the Choctaw Act of May 25, 1918, and like that early act did not refer to the Indians, specifically as a tribe. In considering whether this created "Indian country" and federal criminal jurisdiction although Nevada had already become a State, the Supreme Court in *United States v. McGowan,* stated, 302 U.S. at 538-539 (1938):

> The fundamental consideration of both Congress and the Department of the Interior in establishing this colony has been the protection of a dependent people. Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as "reservations." Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out, and it is immaterial whether Congress designates a settlement as a "reservation" or "colony." In the case of United States v. Pelican, 232 U.S. 442, 449, this Court said:
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> "In the present case the original reservation was Indian country simply because *it had been validly set apart for the use of the Indians as such, under the superintendence of the Government.*"

> The Reno Colony has been validly set apart for the use of the Indians. It is under the superintendence of the Government. The Government retains title to the lands which it permits the Indians to occupy. The Government has authority to enact regulations and protective laws respecting this territory. "Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States." *United States v. Ramsey*, 271 U.S. 467, 471. [footnotes omitted, emphasis in original.]

While it is clear that the Mississippi Choctaw Reservation is validly established, the existence of federal and tribal criminal jurisdiction, and the absence of state jurisdiction, turns on the definition of Indian country in 18 U.S.C. 1151 not "reservation status." As *McGowan* demonstrates, the acquisition of land in trust for the Indians and the extension of federal services to them creates Indian country. Under 18 U.S.C. 1151, federal jurisdiction extends not only to all land within an Indian Reservation but to "(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state . . . ." The land held in trust for the Mississippi Band of Choctaw Indians is clearly within this definition.

C. The jurisdiction of the United States and the Tribe is Exclusive as to Crimes Involving Indians.

The criminal jurisdiction of the Tribe and of the United States precludes state jurisdiction over offenses committed by or against Indians in Indian country, and thus precludes jurisdiction by the State of Mississippi over the appellants here.

In *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962), this Court, after determining that the crime in question occurred in Indian country under 18 U.S.C. 1151 because it occurred within an Indian reservation although on non-Indian land (*id* at 357-359), specifically held (*id* at 359):

> "Since the burglary with which petitioner was charged occurred on property plainly located within the limits of that reservation, the courts of Washington had no jurisdiction to try him for that offense."

See also *United States v. Antelope*, 430 U.S. 641. The Court's holding in *Seymour* is in harmony with the general principal restated in *McClanahan v. Arizona Tax Commission* 411 U.S. 164 (1973) that whether based on tribal sovereignty or federal pre-emption, state law is generally not applicable to Indians within Indian country with tribal governments unless such state law is expressly made applicable by Congress, 411 U.S. 164, 167-174. Indeed, as the Court stated in *McClanahan* (411 U.S. at 171,) quoting from *Williams v. Lee*, 358 U.S. 217):

> ". . . state courts have been allowed to try non-Indians who committed crimes against each other on a reservation . . . . But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive . . . ." (411 U.S. at 171)

The wisdom of these decisions has been amply demonstrated in the Choctaw experience. The exercise of state jurisdiction resulted in a double problem—inadequate law enforcement, and abusive law enforcement. Both of these problems have been substantially resolved by the establishment of the BIA-tribal court, police force and jail,

and federal prosecution of major crimes, whether by or against Indians (see *United States v. Antelope, supra*).[18]

D. The fact that the land is not all contiguous is irrelevant

The court of appeals reasons (Pet. App. 5a-8a) that 18 U.S.C. 1151 is not intended to apply to non-contiguous tracts of land, such as the Choctaw Reservation. This is incorrect.

To begin with, the Section has no such requirement, and to impose one would be pure judicial legislation. But in addition, by including category three—trust allotments outside Indian reservations—as within the definition of Indian country, Congress specifically provided Indian country jurisdiction over non-contiguous tracts. Such allotments are by no means uncommon, see *DeCoteau v. District County Court*, 420 U.S. 425, 427-428 (1975).

In addition, the policy of the Act also dictates that there should be federal jurisdiction over the Mississippi Choctaw trust land. To begin with, although some of the land is non-contiguous, the Reservation essentially consists of trust land in seven traditional rural Indian communities far removed from centers of non-Indian

[18] Neither the State, the United States nor the Tribe seeks concurrent state-federal jurisdiction where Indians are involved. In terms of law enforcement where everyone has responsibility, no one has responsibility. From the Tribe's view, moreover, concurrent jurisdiction, in addition to weakening law enforcement, leaves defendants open to double prosecution, as was the case here. But more important it again would subject tribal Indians to arrest, incarceration, and trial by county authorities for matters involving Indians and occurring on the Reservation, a situation that proved bad for all concerned in the past.

population. Within each village, the Indian land is reasonably compact and is well known and marked. No one as a practical matter is confused about whether he is on Indian land or privately owned land.

But most important, in nine years of tribal and federal law enforcement, any inconvenience in the situation of Indian land has been far outweighed by the benefits of law enforcement responsive to the needs of the quite separate Indian community. The experience of federal-Indian law enforcement has, in the Tribe's view, and we believe in the view of the non-Indian community as well, proved itself a success (see Apps. B, C and D, *infra*). The court of appeals' "practicality" argument is unfounded.

CONCLUSION

The decisions of the Supreme Court of Mississippi and of the United States Court of Appeals for the Fifth Circuit should be reversed and the case should be remanded to the court of appeals for consideration of the non-jurisdictional issues.

Respectfully submitted,

HARRY R. SACHSE

SONOSKY, CHAMBERS
& SACHSE
2030 M Street, N.W.
Washington, D.C. 20036
Attorneys for Amicus Curiae.

APPENDIX

APPENDIX A

Law and Order

December 17, 1968

Commissioner, Bureau of Indian Affairs
Washington, D.C. 20242
Attention: Chief, Branch of Law and Order

Dear Sir:

In response to a telephone conversation with Mr. James Fail requesting information pertaining to the status of the Roby Gibson Case, the following information is being submitted.

Brief: During the early morning hours of May 26, 1968, Roby Gibson was alleged to have murdered his wife, Helen, by apparently drowning her in a bathtub of their home which was located in the Pearl River Indian Community, Neshoba County, Mississippi. Mr. Gibson was arrested at approximately 10:00 A.M. on May 26, 1968, by E. G. "Hop" Barnett, Sheriff of Neshoba County, Mississippi.

On May 27, 1968, Roby Gibson appeared before Vernon Myers, Justice of the Peace, Philadelphia, Mississippi, on a complaint filed by Sheriff Barnett, charging Roby Gibson with Murder. The defendant was arraigned, held without Bond, and remanded to the custody of the sheriff and lodged in the Neshoba County Jail awaiting trial at the Fall Term of Court.

On September 6, 1968, a complaint was filed by Special Agent Don Ceaser of the FBI before U. S. Commissioner Richard Wilburn of Meridian, Mississippi, charging the defendant in violation of Title 18, Sections 1153 and 111, USCA—Murder. A warrant was issued and subsequently placed against the defendant who was being held in the Neshoba County Jail on a State's charge of Murder.

On September 13, 1968, the Honorable O. H. Barnett, Judge of the Circuit Court of the 8th. District in and for Neshoba County, rendered the following decision to wit: "therefore the jurisdiction of this case is found to be within the exclusive jurisdiction of the United States Federal Courts, and it is hereby

ORDERED, ADJUDGED AND DECREED that said Writ of Habeas Corpus be sustained, and that is has come to the Courts attention that the petitioner has been placed on a detainer by the U. S. Commissioner of the Southern District of Mississippi.

Being informed of said detainer and of the issuance of a warrant for his arrest, the court orders, adjudges and decrees that said Sheriff keep the Petitioner in his custody to await his formal arrest by U. S. Federal Marshalls.

ORDERED AND ADJUDGED, this, the 13th day of September, 1968."

Sgd./O. H. Barnett

On September 16, 1968, U. S. Deputy Marshall E. P. Miller took the defendant into custody and appeared before U. S. Commissioner Richard Wilburn of Meridian, Mississippi, and the defendant was committed to the Lauderdale County Jail in lieu of $1,000 bail.

On September 23, 1968, the defendant reappeared before U. S. Commissioner Richard Wilburn of Meridian, Mississippi. The defendant waived preliminary hearing and was remanded to jail without bond.

On October 30, 1968, on a motion made by the defendant's attorney, a pre-trial hearing was held in the Chambers of the Federal District Judge, Judge Cox, relative to releasing the defendant on his own recognizance. Judge Cox's decision relative to this matter was that he

did not feel that it was appropriate to release the defendant on his own recognizance at this time. Judge Cox set bond at $15,000.

On December 3, 1968, the Grand Jury entered a true bill charging the defendant with Murder pursuant to Sections 1153 and 111, Title 18, USCA.

Sincerely,

(sgd.) E. J. Fisher

E. J. Fisher
Acting Superintendent

cc:
chron
file—L&O 175.6
Adm.
chron

APPENDIX B

February 17, 1978

TO WHOM IT MAY CONCERN:

I CERTIFY THAT THE ATTACHED COPY IS A TRUE AND CORRECT COPY OF THE OFFICIAL DOCUMENT ON FILE AT THE CHOCTAW INDIAN AGENCY OFFICE WHICH IS UNDER MY CUSTODY AND CONTROL AS SUPERINTENDENT OF THE CHOCTAW INDIAN AGENCY.

/s/ Robert C. Benn
Superintendent

VERNON R. COTTEN
ATTORNEY AT LAW
205 MAIN STREET
CARTHAGE, MISSISSIPPI 39051
TELEPHONE
AREA CODE 601
267-9971

February 1, 1978

Mr. Robert Benn, Supt.
Choctaw Indian Agency
Bureau of Indian Affairs
421 Powell Street
Philadelphia, Mississippi

RECEIVED
CHOCTAW AGENCY
PHILADELPHIA, MISSISSIPPI
FEB 06 1979
AM 7,8,9,10,11,12,1,2,3,4,5,6 PM

RE: In the Matter of the Tribal Court

Dear Robert:

I am writing this letter in my capacity as Leake County Prosecuting Attorney and in support of the efforts which you and your subordinates are now making to restore the Tribal Court system and the Indian Law and Order agency.

I feel that I am qualified to evaluate the effectiveness of the Tribal Court, as I have been Prosecuting Attorney for the past 10 years. There have been a number of occasions during this time wherein we have had to call upon Law and Order to assist us in serving papers or making arrests on the reservation. To the best of my information, that cooperation has been 100 percent.

Our criminal docket is usually heavy, and the machinery of the Tribal Courts has certainly served to take a burden off Leake County. I have had a chance to observe the justice and punishment meted out by the Tribal Criminal authorities, and here again I believe this has been effective.

I also serve as Youth Court Prosecutor in my capacity as County Attorney. When I first took office, we were dealing with Indians through the Leake County Youth Court. However, it later developed that the Tribal Court took jurisdiction. I feel the latter move has been more effective because you actually have dormitories and physical facilities on the reservation to deal with Indians exclusively and they are probably more responsive to rehabilitation efforts from their own people.

In summary, please consider this my letter of support and best wishes in your efforts in trying to restore the Tribal Court system which existed in 1977. I pledge my support

VERNON R. COTTEN
ATTORNEY AT LAW
208 MAIN STREET
CARTHAGE, MISSISSIPPI 39051

TELEPHONE
AREA CODE 601
267-9071

and help in any way needed.

With kindest personal regards, I remain,

Very truly yours,

Vernon R. Cotten

Vernon R. Cotten

VRC:if

cc enclosed for Kaye

APPENDIX C

February 17, 1978

TO WHOM IT MAY CONCERN:

I CERTIFY THAT THE ATTACHED COPY IS A TRUE AND CORRECT COPY OF THE OFFICIAL DOCUMENT ON FILE AT THE CHOCTAW INDIAN AGENCY OFFICE WHICH IS UNDER MY CUSTODY AND CONTROL AS SUPERINTENDENT OF THE CHOCTAW INDIAN AGENCY.

BOARD OF SUPERVISORS
WILLIAM E. WOOTEN
District One
DARRELL F. DICKENS
District Two
BENNIE TRUESDALE
District Three
LEON WATKINS
District Four
CRAWLEY ALFORD
District Five

Leake County Board of Supervisors

CRAWLEY ALFORD, President
Carthage, Mississippi 39051

NEAL [illegible]
Clerk
ROBERT BROOKS
Attorney

February 6, 1978

Mr. Robert Benn, Supt.
Choctaw Indian Agency
Bureau of Indian Affairs
421 Powell Street
Philadelphia, Mississippi

Re: In the Matter of the Tribal Court

Dear Sir:

We would like to express our support for your efforts in trying to restore the Tribal Court system which existed in 1977. The Tribal Courts have served to take a great burden off the Criminal and Youth Courts of the county, thereby reducing the economic burden of the County Government.

The Indian Law and Order Agency has been very efficient in maintaining order and the Tribal Courts have been very effective in administering justice.

We believe that it would be in the best interest of all Leake Countians that the Tribal Courts and the Indian Law and Order Agency be restored.

Very truly yours,
D. C. Alford

D. C. Alford, President

RECEIVED
CHOCTAW AGENCY
PHILADELPHIA MISSISSIPPI
FEB 06 1978
AM 7 8 9 10 11 12 1 2 3 4 5 6 PM

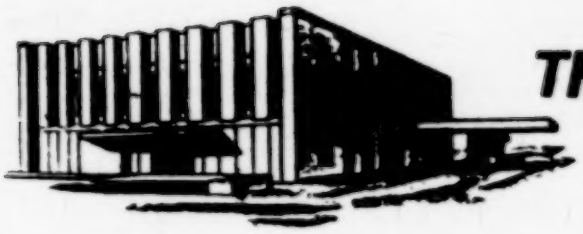
APPENDIX D

February 17, 1978

TO WHOM IT MAY CONCERN:

I CERTIFY THAT THE ATTACHED COPY IS A TRUE AND CORRECT COPY OF THE OFFICIAL DOCUMENT ON FILE AT THE CHOCTAW INDIAN AGENCY OFFICE WHICH IS UNDER MY CUSTODY AND CONTROL AS SUPERINTENDENT OF THE CHOCTAW INDIAN AGENCY.

/s/ Robert C. Benn
Superintendent



THE CITIZENS BANK
OF PHILADELPHIA
PHILADELPHIA, MISSISSIPPI 39350

February 20, 1978

Mr. Robert Benn, Supt.
Choctaw Indian Agency
Bureau of Indian Affairs
421 Powell Street
Philadelphia, Mississippi

Dear Sir:

We plan to open our Pearl River Branch no later than April 15th of this year and our security for the Branch Bank is tied in to the law and order building on the reservation. We hope that the tribal law and order system will be reinstated for this and several other reasons. The Agency does a good job in maintaining order and we understand the court system is quite effective.

We think it would be good for all Neshoba Countians for this tribal law and order and court system to be restored.

Sincerely,

Steve Webb
President

SW/bnh

Serving Since 1908